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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 66

THE WALLACE CORPORATION, PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD

No. 67

RICHWOOD CLOTHESPIN & DISH WORKERS' UNION, PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONS FOR CERTIORARI FILED APRIL 24, 1944.

CERTIORARI GRANTED MAY 29, 1944.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. C-2321

In the Matter of THE WALLACE CORPORATION and B. E. THOMPSON and LOCAL UNION No. 129, UNITED CONSTRUCTION WORKERS ORGANIZING COMMITTEE

Mr. Thomas E. Shroyer, for the Board.

Lewis, Rice, Tucker, Allen & Chubb, by Mr. R. Walston Chubb, of St. Louis, Mo., and Wolverton & Callaghan, by Mr. Brooks B. Callaghan, of Richwood, W. Va., for the respondent.

Mr. Yelverton Cowherd, of Washington, D. C., for the Union.

Ritchie, Hill & Thomas, by Mr. Charles Ritchie, of Charleston, W. Va., for the Independent and for B. E. Thompson, and Mr. M. E. Boiarsky, of Charleston, W. Va., for the Independent.

Mr. Eugene R. Thorrens, of counsel to the Board.

DECISION AND ORDER—June 7, 1943

STATEMENT OF THE CASE

Upon a second amended charge duly filed on June 25, 1942, by Local Union No. 129, United Construction Workers Organizing Committee, herein called the Union, the Na-
[fol. 2] tional Labor Relations Board, herein called the Board, by the Regional Director for the Ninth Region (Cincinnati, Ohio), issued its complaint dated June 25, 1942, against The Wallace Corporation and B. E. Thompson, Richwood, West Virginia, herein jointly called the respondents, and severally, the respondent Wallace and the respondent Thompson, alleging that the respondents had engaged in and were engaging in unfair labor practices affecting commerce, within the meaning of Section 8. (1), (2), and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint and notice of hearing thereon were duly served upon the respondents, the Union, and Richwood Clothespin & Dishworkers' Union, herein

called the Independent, a labor organization alleged in the complaint to be company-dominated.

With respect to the unfair labor practices, the complaint as amended at the outset of the hearing alleged in substance: (1) that since on or about July 1, 1941, the respondents interfered with and discouraged employees at the Richwood plant of the respondent Wallace with respect to their membership and activities in the Union while encouraging membership in the Independent (a) by urging, persuading, and warning said employees to join the Independent and or to refrain from aiding, becoming or remaining members of the Union; (b) by making disparaging and derogatory remarks about the Union and its leaders; (c) by stating that the respondent Wallace would not recognize the Union and would cease operating its plant if the Union succeeded in organizing the employees; (d) by keeping under surveillance the activities and meeting places of the Union; (e) by attempting to induce members of the Union to resign and to refrain from concerted activities; (f) by seizing union identification badges from the persons of [fol. 3] union members; (g) by bribing employees to vote for the Independent and against the Union in an election conducted by the Board on January 30, 1942; and (h) by posting and distributing written material calculated to influence the employees to vote for the Independent and against the Union in said election, and otherwise interfering with the free choice of the employees in the election; (2) that on or about October 2, 1941, the respondents initiated, formed, and sponsored the Independent, and have since dominated and interfered with its administration, and contributed to its support; (3) that on or about March 18, 1942, the respondent Wallace, purporting to act pursuant to an alleged agreement between itself and the Independent, discharged and thereafter refused to reinstate 43 named employees [1] because they were members of the Union and because they were not members of the Independent; (4) that said contract, if it existed, was illegal and void since it was made with a labor organization assisted by unfair labor practices and not the representative of the employees pursuant to Section 9 (a) of the Act; and (5) that by the foregoing acts, the respond-

[1] They are listed in Appendix A.

ents interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

On June 24, 1942, the respondents filed separate answers to the complaint and separate motions to dismiss the proceeding,[2] which in substance denied the alleged unfair labor practices and set forth affirmative matters hereinafter discussed. Among other things, the respondents averred in [fol. 4] substance that the Independent was the lawful bargaining agent of the employees as the result of an election conducted by the Board pursuant to certain settlement agreements and that the 43 employees were discharged pursuant to the terms of a contract with the Independent.

Pursuant to notice, a hearing was held at Summersville, West Virginia, from July 9 through July 15, 1942, before William E. Spencer, the Trial Examiner duly designated by the Chief Trial Examiner. At the opening of the hearing the Independent filed a petition to intervene in the proceeding, which the Trial Examiner granted insofar as the interests of the Independent were affected by the proceeding, and the Independent filed an answer to the complaint and a motion to dismiss the case. In its answer and motion to dismiss, the Independent denied the alleged unfair labor practices relating to it and set forth affirmative matter substantially similar to that asserted by the respondents. The Board, the respondents, the Union, and the Independent were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties. At the opening of the hearing the Trial Examiner denied the motions to dismiss filed by the respondents and the

[2] Theretofore, the Board had issued a previous complaint to which the above-mentioned pleadings were directed. At the opening of the hearing the Board amended the complaint by substituting the present complaint containing in its caption the name of B. E. Thompson and alleging that he is an employer within the meaning of the Act. By appropriate orders, the respondent Wallace's answer and motion to dismiss theretofore filed were allowed to stand as pleadings to the complaint in issue in this proceeding and the respondent Thompson was permitted to amend his answer to deny the new allegation.

Independent without prejudice to their renewal, and denied a motion of the respondent Wallace for a bill of particulars without prejudice to a request for a continuance in the event of surprise. No request for a continuance was made. A motion by counsel for the Board to strike certain portions of the answers of the respondent Thompson and of the Independent, respectively, which alleged in substance that because of acts of misconduct engaged in by union officers, agents, and members, the Union was not a "labor organization" authorized to file a charge under the Act, [fol. 5] was granted. This ruling is hereby affirmed.[3]

At the close of the Board's case, the respondents and the Independent moved to strike all testimony of the Board's witnesses relating to matters antedating the settlement agreements hereinabove referred to and to dismiss the complaint because of failure of proof. The motions were denied. At the close of the hearing the motions to dismiss and to strike the testimony of the Board's witnesses were renewed, and ruling thereon was reserved. In his Intermediate Report, the Trial Examiner granted the motion to dismiss as to the respondent Thompson,[4] and denied the remaining motions upon which ruling had been reserved. At the conclusion of the hearing, a motion by counsel for the Board to conform the pleadings to the proof was granted without objection. During the course of the hear-

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[3] In N. L. R. B. v. Indiana & Michigan Electric Company, 318 U. S. 9, the Supreme Court stated: "We cannot agree with the view of the Circuit Court of Appeals that the evidence [of misconduct] might disqualify Local B-9 from making the charge of violation against the Company or deprive the charge of force and effect, and thereby defeat the Board's jurisdiction to hear the case." Furthermore, we do not regard such allegations of misconduct, even if proved, as sufficient reason to discontinue the proceeding.

[4] We agree with the Trial Examiner's conclusion that the evidence does not sustain the allegation that B. E. Thompson is an employer of the employees involved herein within the meaning of the Act. The Union did not file exceptions. Under the circumstances we shall dismiss that allegation of the complaint in accordance with the Trial Examiner's recommendation. Hereinafter references to the respondent are to The Wallace Corporation.

ing the Trial Examiner made rulings on other motions and on objections to the admission of evidence. The Board has reviewed the Trial Examiner's rulings and finds that no prejudicial errors were committed. The rulings are hereby affirmed. After the hearing the respondent submitted a brief to the Trial Examiner.

Thereafter, the Trial Examiner issued his Intermediate Report dated September 2, 1942, copies of which were duly served upon all the parties, finding that the respondent had engaged in and was engaging in unfair labor practices [fol. 6] affecting commerce, within the meaning of Section 8 (1), (2), and (3) and Section 2 (6) and (7) of the Act. He recommended, among other things, that the respondent cease and desist from engaging in the unfair labor practices, disestablish the Independent as the bargaining representative of its employees, and reinstate, with back pay from a date 10 days after the issuance of the Intermediate Report to the date of offer of reinstatement, 43 employees found by him to have been discriminated against. On October 3 and 5, 1942, respectively, the Independent and the respondent filed exceptions to the Intermediate Report and briefs in support thereof. Pursuant to notice, a hearing for the purpose of presenting oral argument was held before the Board in Washington, D. C., on November 17, 1942. The respondent and the Union were represented by counsel and participated in the argument.

On February 27, 1943, the Board issued its Decision and Order. On May 1, 1943, upon due notice to all parties, the Board, acting pursuant to Section 10 (d) of the Act, vacated and set aside its Decision and Order and directed reargument. Pursuant to notice, a hearing for the purpose of reargument was held before the Board in Washington, D. C., on May 13, 1943. The respondent, the Union, and the Independent were represented by counsel and participated in the reargument.

The Board has considered the exceptions and briefs and, insofar as the exceptions are inconsistent with the findings of fact, conclusions of law, and order below, finds them to be without merit.

[fol. 7] Upon the entire record in the case, the Board makes the following:

Findings of Fact

I. The business of the respondent

The respondent, a Missouri corporation with its principal office at St. Louis, Missouri, is engaged in the manufacture, sale, and distribution of clothespins and wood and paper food trays. It maintains a plant in Richwood, West Virginia, which is the only plant involved in this proceeding. At the Richwood plant the principal raw material used is wood, nearly all of which originates in the State of West Virginia. During the year immediately preceding the hearing, the respondent purchased raw materials in excess of $100,000 in value, which were used in the manufacturing process at the Richwood plant. During the same period, the respondent's gross sales of products finished at the Richwood plant exceeded $200,000. Of this amount, over 75 percent in value were shipped from the Richwood plant to point outside the State of West Virginia. The respondent admits that it is engaged in commerce within the meaning of the Act.

II. The organizations involved

Local Union No. 129, United Construction Workers Organizing Committee is a labor organization, affiliated with the Congress of Industrial Organizations, admitting to membership employees of the respondent.

Richwood Clothespin & Dishworkers' Union is an unaffiliated labor organization admitting to membership employees of the respondent.

[fol. 8] ### III. The unfair labor practices

A. *Events prior to the settlement agreements*

The Union began organizing the respondent's employees late in July 1941, when it held an open meeting on the grounds of the high school in Richwood. The meeting was attended, among other employees, by Irene Weese Groves,[1]

[1] To avoid confusion with another female employee having the same surname, hereinafter we will refer to Irene Weese Groves as Weese.

the respondent's paymaster and confidential secretary to A. F. Davis, the respondent's plant manager, and by Harry White, the millroom foreman at the respondent's plant.[6]

During the period from late July to September 25, 1941, when a strike occurred at the respondent's plant, according to partially undenied testimony credited by the Trial Examiner, management representatives made statements to employees calculated to discourage union membership. Harvey Dodrill, an employee, who actively solicited union memberships among fellow workers and became an officer in the Union, testified that he heard Wilbur McIlwee, a foreman, telling a group of employees that M. B. Wallace, Jr., the respondent's president, had stated that he would close the Richwood plant and "move it away" rather than recognize the C. I. O., and directing them to attend a scheduled union meeting and to oppose proposed organization of the employees in the Union. He further testified that on another occasion he was warned by McIlwee that union employees would lose their jobs if Dodrill did not "quit agitating union and getting signers." McIlwee did not testify and no explanation was given for his failure to appear as a witness. We credit Dodrill's testimony, as did the Trial Examiner, and find that McIlwee made the statements attributed to him by Dodrill.

[fol. 9] Dodrill further testified that in July 1941, about a week after he started organizing, Foreman Sisco Gibson interrogated Dodrill with respect to his union membership and asked him whether he had enrolled other employees for membership in the Union. According to Dodrill, when he answered in the affirmative, Gibson further stated, among other things, that Wallace had warned that he "would never * * * recognize the C. I. O." Dodrill also testified that he was questioned by Foreman Harry White with respect to organizing activities in which Dodrill engaged and was warned by White that continuance of union activities would result in loss of employment. According to Dodrill, White stated that if Dodrill "did go ahead and organize * * * Wallace would not recognize the Union—that we would all be out of a job, he would

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[6] At the meeting, when questioned by an employee as to whether she planned to join the Union, Weese replied: "No, it would not be a good policy."

shut the plant down and move it away, that they wasn't making any money." According to Harvey's wife, Roxie Dodrill, also an employee of the respondent, she was told just before the outbreak of the strike by Alva Sleeth, a foreman, that Plant Manager Davis had instructed Sleeth, shortly after Davis had returned from an out-of-town conference with President Wallace, to tell the employees that "the ones that did not sign up with the C. I. O. didn't have anything to worry about, * * * that the company would see that they were taken care of."

Another employee, William D. Griffie, who signed an application for union membership at the Union's first organizational meeting, testified that on the following morning he was approached in the plant by Foreman Harry White who felt about Griffie's chest and inquired as to the whereabouts of his "badge"; that Griffie stated that he had not received a badge but that he had a union card which was available for White's inspection; that White stated that he knew of the card but did not wish to see it; and, that White further stated that the card would "never do [Griffie] no good there * * * the C. I. O. would never operate [fol. 10] in that plant." In addition, shortly after September 1, 1941, when the Union first requested company recognition, according to Griffie, he had a conversation with White in the plant in which White disclosed that he had just attended "a meeting at the office," and stated that "Mr. Davis had just come in from St. Louis, and that Mr. Wallace told them, if he told them one time he told them twenty times, they would never operate under the C. I. O." Except as noted below,[7] at the hearing, White, Sleeth, and Sisco Gibson denied making the statements above ascribed to them by employees who appeared as witnesses on behalf of the Board. Under the circumstances, we credit, as did the Trial Examiner, the testimony of the Board witnesses set forth above, and find that White, Sleeth, and Sisco Gibson made substantially the statements testi-

[7] White admitted in his testimony that he had discussed the Union with Dodrill and Griffie and that he [White] "might have" asked Dodrill how he was getting along with his union.

fied to, and that their statements are attributable to the respondent.[8]

Sometime in September, prior to the outbreak of the strike, Davis had discussed the respondent's labor relations policy with Wallace at his summer home in Michigan. When Davis returned to the plant, he reported Wallace's instructions to the foremen. According to the testimony of Wallace and Davis, Wallace told Davis only that the respondent was opposed to a closed shop.[9] Davis denied making any statement to the foremen other than transmitting Wallace's asserted expression of company policy with respect to a closed shop, and Davis and foremen testified that the foremen were instructed by Davis [fol. 11] not to interfere with union organization. We find no merit in a contention of the respondent that it should not be held responsible for statements of its foremen in contravention of instructions given them.[10]

In the first part of September 1941, the Union requested company recognition as exclusive bargaining representative. When the respondent challenged the Union's claim to be majority representative, the Union proposed that its status be determined by a check of union membership applications and the company pay roll. The respondent refused to agree to this method unless it was permitted in connection therewith to interrogate such applicants as to whether they desired the Union to represent them in collective bargaining negotiations. The Union rejected the respondent's counter-proposal. The respondent also proposed that the question of representation be resolved

[8] The respondent admits that Foremen White, McIlwee, Sleeth, and Sisco Gibson occupied supervisory positions.

[9] At the hearing Wallace stated that he had no objection to a "union shop" since such an arrangement did not restrict an employer's right to hire employees. As indicated hereinafter, however, subsequently the respondent, with knowledge that the Independent planned to exclude employees from membership, entered into a contract with the Independent requiring membership therein as a condition of employment and thereafter discharged employees denied membership in the Independent.

[10] See, for example, H. J. Heinz Co. v. N. L. R. B., 311 U. S. 514, 519-521.

by a Board election, but the Union refused to consent to an election unless the respondent reinstated Harvey Dodrill, president of the Union, who had been discharged in August.[11] Following a union ultimatum embodying its proposals set forth above, which the respondent rejected, the Union called a strike on September 25, 1941, and established a picket line; and the plant was shut down.

The Independent came into existence during the first week of October 1941. According to uncontradicted testimony, a meeting of a group of the respondent's employees was scheduled to be held on the night of October 2 at the home of Clark Gibson, a foreman at the respondent's plant, who lived on the main street of Richwood; that night Gibson met the employees on a street corner and adjourned the [fol. 12] meeting to the home of Mrs. Lundy Groves, an employee,[12] who lived in a more secluded section of Richwood, because Clark Gibson's house was "filled up" and "there [were] too many C. I. O. members [about]."[13] When the employees assembled at the Groves' home, Mrs. Groves telephoned Weese, the respondent's paymaster and confidential secretary to Plant Manager Davis,[14] for assistance in organizing the group as the nucleus of a labor organization.[15] According to a Board witness' version

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[11] Dodrill, a member of the Union's bargaining committee, testified without contradiction, and we find, that in the course of negotiations Davis stated that he would not reinstate Dodrill because "he was too much of a union agitator." As hereinafter appears, Dodrill was reinstated pursuant to the terms of a settlement subsequently made in January, 1942, and his discharge in August is not in issue in this proceeding.

[12] We hereinafter find that her husband, Lundy Groves, who acted as foreman in Clark Gibson's absence from the plant, is identified with management.

[13] Neither Clark Gibson nor the Lundy Groves appeared as witnesses and no explanation was given for their failure to testify except that counsel for the Independent stated at the hearing that he felt it unnecessary to call any witnesses.

[14] Weese and Mrs. Lundy Groves are related through their husbands.

[15] At the time Weese, City Recorder of Richwood, was in attendance at a meeting of the City Council.

of a conversation with Mrs. Lundy Groves on the morning of October 3, which we credit, as did the Trial Examiner, Mrs. Lundy Groves invited Weese to attend the meeting for the purpose of assisting in the formation of a labor organization for the respondent's employees, but that Weese declined stating that she was unable to attend and, instead, recommended B. E. Thompson, a local newspaper editor and a respondent in this proceeding as a man experienced in union affairs.[16] Thompson attended the meeting on the night of October 2 at the Groves' home and the Independent was organized at the meeting with [fol. 13] Lundy Groves as a member of its Board of Directors.[17] Thereafter Thompson became business manager

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[16] At the hearing Weese admitted having the telephone conversation with Mrs. Lundy Groves but testified that she did not recall mentioning Thompson's name and that she referred Mrs. Lundy Groves to The Greater Richwood Federation, an organization of business men. Thompson testified that he attended the meeting as a result of a telephone call from Mrs. Lundy Groves, whom he did not know prior to the meeting, and that he had no conversation with Weese with respect to the meeting prior to his visit to the Groves' home. We find, as did the Trial Examiner, that Weese recommended Thompson to Mrs. Lundy Groves and that she invited Thompson to attend the meeting as a result of Weese's recommendation.

[17] Thereafter Carm Reese acted as president of the Independent and Reese, Ancil Smith, and Lundy Groves served as members of its bargaining committee. The names of the three appeared on the eligibility list in connection with the election hereinafter discussed and they were permitted to vote in the election. At the outbreak of the strike, Reese worked as an oiler in the millroom under Foreman White who, in his absence, left the department in Reese's charge. After the end of the strike, the respondent placed Reese in charge of a night shift. Groves and Smith worked in different departments as machine set-up men. Their main duties consisted in maintaining and repairing machinery. However, in the absence of their foremen, Groves and Smith acted in their place, giving orders to machine operators with respect to the manner and method of production. Groves, particularly, acted as

of the Independent and published a series of editorials in opposition to the Union and in favor of the respondent and the Independent.

Prior to October 14, 1941, conferences took place between the Independent and the respondent. Under date of October 14, the Independent formally requested company recognition as "a collective bargaining agency for your employees." By October 10, however, the Union had filed charges with the Board, and the respondent did not act upon the Independent's request.[18] On October 31, the

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foreman often and for extensive periods due to frequent illnesses of Clark Gibson, his immediate superior. Next to the foremen, who received a salary, the machine set-up men were the highest hourly paid employees in their respective departments. Although they had no authority with respect to the hiring or discharge of employees, the machine operators regarded them as assistant bosses or assistant foremen. A union leader, Mike Golleen, was also employed as a machine set-up man, but so far as appears, he did not act as a temporary foreman. Other employees who belonged to the Union acted as temporary foremen but, so far as appears, they were only rank and file union members. Under the circumstances, we find that Lundy Groves, Ancil Smith, and Carm Reese are identified with management and that their conduct in connection with the formation and administration of the Independent is attributable to the respondent. See, for example, International Association of Machinists v. N. L. R. B., 311 U. S. 72; Matter of Decatur Iron & Steel Company and Steel Workers Organizing Committee, 29 N. L. R. B. 1044; Matter of Ford Motor Company and United Automobile Workers of America, Local No. 235, 23 N. L. R. B. 342.

[18] William D. Griffie, a union shop steward and member of the Union's negotiating committee who was active in the solicitation of union members, testified without contradiction that the Union had 165 members, a clear majority, within a week after the beginning of its organizational drive. According to the undenied testimony of a Board witness quoting Mrs. Lundy Groves, which we credit, as did the Trial Examiner, in response to an inquiry by Thompson at the meeting of October 2 referred to above, Lundy Groves stated that the Union undoubtedly commanded a majority.

[fol. 14] Independent filed with the Board a petition for investigation and certification of representatives pursuant to Section 9 (c) of the Act.[19] During the period between November 1, 1941, and January 12, 1942, a series of conferences took place, in which Board agents and interested parties participated, to settle the pending charge of unfair labor practices and to resolve the question of recognition, but without avail. During this period the respondent mailed post cards and sent foremen to the homes of individual employees soliciting their return to work. In at least one instance, according to undenied testimony which we credit, Foreman Clark Gibson notified a subordinate female employee, Frances Logar, that "we had a meeting this morning and I got orders to go around and ask all the girls to go back to work * * * the plant is going to reopen at 2 o'clock and if you don't come back you are off the pay roll."[20] According to the testimony of another employee, Minnie Givens, with respect to such solicitation, which was denied, Foreman White stated that "they will never run under the C. I. O." We find, as did the Trial Examiner, that White made the statement attributed to him by Givens. In connection with its organizational drive, the Independent also urged employees to return to work. Furthermore, Griffie testified without contradiction, and we find as did the Trial Examiner, that when he was solicited during the strike to join the Independent, Lundy Groves stated "that was the only way we was ever a going to get back to work up there, if we ever got this thing settled we would have to settle it in that way."

On December 30, 1941, by telegram the Union proposed to the respondent that an election be conducted permitting the employees a choice between the Union and the Independent as their representative provided that the respond-
[fol. 15] ent agree to enter into a close-shop contract with the Union in the event that it won the election. So far as appears, the Union recived no direct reply to its telegram from the respondent. The rspondent's response, pub-

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[19] The case involving the Independent's petition was closed on February 4, 1942, on the basis of a consent election hereinafter discussed.

[20] Clark Gibson, concededly a supervisor, did not testify, and no explanation was given for his failure to appear as a witness.

lished on the front page of Thompson's newspaper on January 1, 1942, rejected the Union's proposal at least until "law and order have been restored in Richwood," the union picket line and other unnamed "coercive" elements removed, the employees allowed to return to work, and the consent of the Independent to such an election obtained.

On January 12, 1942, President Wallace and William T. Christmas, vice president and treasurer of the respondent, who maintain offices at St. Louis, Missouri, arrived in Richwood for the avowed purpose of deciding either to reopen the plant or to close it permanently.[21] After discussing the matter with Richwood inhabitants and Independent adherents who desired to return to work, Wallace decided to resume plant operations the next day.[22] Subsequent to the announcement of Wallace's decision, representatives of the Union and of the Independent had a meeting at which they discussed the holding of an election. The Union proposed a "yes or no" vote with only the Union as a candidate on the ballot, but the Independent would not agree.[23] That night the respondent met with representatives of both unions. The meeting culminated in a settlement agreement, dated January 13, 1942, calling for immediate cessation of the strike; and the plant resumed operations that day.

[fol. 16] B. *The settlement agreements*

The agreement of January 13, signed by the respondent, the Union, and the Independent provided, among other

[21] At the time the respondent had inactive plants in Wisconsin and Michigan. The inactivity of these plants had no connection with the strike at the Richwood plant.

[22] Wallace announced that the plant would reopen at a meeting of The Greater Richwood Federation on January 12. Representatives of the Union were not invited and did not attend the meeting.

[23] After leaving the meeting, Independent representatives went to the home of Plant Manager Davis and there conferred with Wallace. The Independent representatives asked Wallace to confirm or deny statements of union representatives to the effect that management had agreed to a "yes or no CIO ballot," and Wallace denied having assented to such an election.

things, for the immediate resumption of plant operations and for the conduct of an election by the Board to determine the question of representation. In the agreement the respondent undertook to enter into a contract with the union successful in the election requiring membership in that organization as a condition of employment.[24]

Thereafter, the respondent and the Union entered into a written agreement, dated January 19, 1942, and approved by the Board's Regional Director, which provided, among other things, for the settlement and withdrawal of the pending charges,[25] and the respondent and both unions entered into a separate consent-election agreement, dated January 19, 1942, and approved by the Board's Regional Director, which designated both unions as candidates for representatives in an election to be held on January 30, 1942.

C. *Events subsequent to the settlement agreements.*

At the instance of Thompson, President Wallace sent a telegram, dated January 23, 1942, to Thompson which in substance stated that the respondent had the means [fol. 17] to transfer its Richwood operations to other

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[24] The language of the undertaking is as follows:

> "The Company further agrees that if either Union is proven to represent a majority of its employees by said vote, it will recognize a Union Shop, providing that the Company shall at all times retain the right to suspend, hire, or discharge any employee for proper and just cause."

[25] In the settlement arrangement, the respondent agreed in substance, inter alia, that it would not dominate or interfere with the administration of the Independent or engage in any conduct which impeded the exercise by its employees of the rights guaranteed in Section 7 of the Act. Pursuant to the settlement, the respondent instructed its foremen to observe neutrality and posted a neutrality notice in the plant. The case involving the settled charges was closed upon the basis of the adjustment of January 19, 1942.

States.[26] The telegram was publicly displayed in the office of The Nicholas Republican, the newspaper edited by Thompson. A copy of the telegram was posted near the time clock in the plant,[27] and reprints were widely circulated at the instance of Thompson "by some boys" at the plant gates during the week immediately preceding the election. A rumor became widespread among the employees that the Richwood plant would shut down if the Union won the election. Although the respondent had knowledge of the existence of the rumor, it initiated no action to repudiate Wallace's telegram. However, when the Regional Director complained, at his instance Wallace sent Thompson another telegram, dated January 25, in which Wallace asserted that he had not intended to influence the employees in voting in the election and requested Thompson to give

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[26] The telegram read: "Answering your inquiry concerning the statement recently made by me in Cincinnati about having a source of logs available, it is true that I do have sources available in both Wisconsin and Michigan where we own an inactive clothes pin and dish manufacturing plant which could be economically started up within a reasonable time with machinery already there and by tarnsferring (sic) some of the equipment in our Richwood plant." Wallace testified at the hearing that he had no idea at the time as to what Thompson intended to do with the information embodied in the telegram although he (Wallace) knew of Thompson's association with the Independent. At the first oral argument before the Board, counsel for the respondent stated that Wallace dispatched the telegram without first seeking advice of counsel and characterized his action as a "bad" and "silly thing to do."

[27] Griffie testified without contradiction, and we find, as did the Trial Examiner, that on January 26 Griffie's attention was called to Wallace's telegram by Foreman White who stated that the respondent's office boy was posting it at the time clock and invited Griffie to "go down and take a look at it." Except for a short interval, the notice remained posted thereafter and was still posted on the day of the election.

publicity to the second telegram.[28] Thompson did not comply with Wallace's request. After the Regional Director called Thompson's inaction to Wallace's attention, on [fol. 18] or about the night of January 28, Davis went to Thompson's office, secured Wallace's second telegram, and accompanied by Thompson, returned to the plant and posted the telegram after working hours. Thereafter, Davis made no effort to keep the second telegram posted until the election although in the interim reports reached him that it had been removed.[29]

During the week immediately preceding the election, a rumor prevailed among the employees to the effect that the respondent's log supply would be discontinued in the event that the Union won the election. The respondent's chief supplier of logs was The Cherry River Boom & Lumber Company, a Richwood firm,[30] who delivered its logs in cars on its spur track at a "dock" alongside the respondent's pond. About 2 or 3 days before the election, according to the testimony of Roxie, Dodrill, Foreman Sleeth told a group of employees in the plant that "the logs was all taken off the dock and that if the CIO won the election that there would be no more logs if our union was recognized." At the hearing Sleeth denied making such a statement but admitted that he circulated a rumor to the same effect without vouching for its truth. Accord-

[28] The second telegram read: "Regret that some impressions seem to have been formed by my telegram answering your inquiry concerning our source of logs and production. It was not my intention that telegram should in any way affect the outcome of or influence the voters in the election next Friday. We have always insisted that all employees be given equal opportunity to express themslves on questions presented by the Labor Board free from threats or coercion of any kind. We trust you agree and will give this message publicity."

[29] As herein appears, the election was held on January 30.

[30] On September 22, 1942, in another proceeding initiated by charges filed by the Union, the Board ordered The Cherry River Boom & Lumber Company to cease and desist from engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

ing to the testimony of Griffie, on the day before the election, he was called to a window in the respondent's plant by Foreman White who pointed to the absence of cars on the spur track and stated: "There is the result of your CIO * * * if the CIO wins the election tomorrow, you can figure that you will not get no more logs." In his testimony White denied making the statement attributed to him. We find, as did the Trial Examiner, the testimony of Roxie Dodrill and Griffie set forth above, to be substantially accurate.

[fol. 19] At the election, conducted on January 30, 1942, the Independent received a majority of the votes cast.[31] No objections to the conduct of the election having been filed, on February 4, the Regional Director certified the Independent as the exclusive bargaining representative of the respondent's employees.

Thereafter, the respondent and the Independent entered into bargaining negotiations. Under date of February 28, 1942, in a letter to Vice-President Christmas, Thompson demanded that the respondent enter into a closed-shop contract with the Independent in order to permit elimination from the respondent's pay roll of employees unfavorable to the Independent and thereby perpetuate the Independent as the exclusive bargaining representative in the plant.[32]

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[31] Of 207 eligible voters in the election, 186 ballots were cast and counted. The Independent received 98 votes, the Union 83, and 5 votes were cast for neither.

[32] In part, the letter read: "The closed shop will, therefore, give us some control in preventing the hiring of additional employees who are unfavorable to our interests and who would further jeopardize (sic) our majority. It would also provide us with a legal means of disposing of any present employees, including Harvey Dodrill, whom our members have declared by unanamous (sic) ballots that they will not work with, whose presence in the plant is unfavorable to our interests because those who are so unfavorable will not be permitted to become members of our organization and without such membership they would not be permitted to work in the plant under a closed shop contract which we respectfully insist we MUST have."

Thereafter, the respondent and the Independent entered into a 2-year contract,[33] dated March 7, 1942, which provided, among other things, for membership in the Independent as a condition of employment and stipulated that all present and future employees eligible to membership "shall become members" of the Independent within 10 days from date or from date of hiring as the case may be. On March 7, the respondent posted a copy of the contract in the plant. Thereafter, supervisors urged employees to join the Independent. On March 16, the respondent posted in the plant a notice to the effect that, pursuant to the contract, [fol. 20] only members in good standing in the Independent would be permitted to continue in the respondent's employ on and after March 18, 1942. On March 18, 1942, the respondent excluded from its plant and dismissed 43 employees named in Appendix A,[34] when they failed to produce satisfactory proof of membership in the Independent. Subsequently, negotiations looking forward toward the reinstatement of the 43 employees ensued between the Regional Director and the respondent. The respondent asserted that it would not reinstate them without the consent of the Independent, and the Independent refused to assent to their reinstatement. Thereupon, the Union filed the charges which give rise to this proceeding.

D. *Conclusions*

The foregoing facts make evident that, at the very outset of the Union's attempts at employee organization, the respondent declared and demonstrated to the employees its opposition to the Union and forthwith adopted measures designed to frustrate self-organization. We have found above that management representatives sent employees to the Union's first organizational meeting with instructions

[33] The contract is to run for 2 years and from year to year thereafter, subject to the cancellation upon 30 days' notice given prior to the expiration of the 2-year period or any subsequent yearly period.

[34] Of the 43 employees, 12 had not applied for membership in the Independent within the prescribed time limit. The remaining 31 employees had made timely application for membership in the Independent but the Independent had rejected their membership applications.

to oppose association of the respondent's employees with a national affiliated labor organization. In statements to employees foremen let it be known that President Wallace opposed recognition of the Union and that the respondent preferred to remove its plant operations from Richwood rather than deal with the Union. Foremen questioned employees concerning their union membership and activities and warned them against loss of employment in the event that they continued efforts to organize the Union. A foreman warned an employee, who was active in soliciting membership on behalf of the Union, that union members would [fol. 21] lose their jobs if he did not "quit agitating union and getting signers." The same employee was warned by another foreman that union organization would be futile since President Wallace would close the plant and remove its operations rather than recognize the Union. A third foreman disclosed that the respondent would make suitable provision for those employees who did not join the Union. During negotiations with the Union in September 1941, Plant Manager Davis characterized a member of the union committee as an "agitator" and proposed, among other things, that management representatives interrogate employees concerning their desires with respect to representation by the Union for the purposes of collective bargaining. In this atmosphere a strike occurred.

Within about a week after the outbreak of the strike, the Independent appeared on the scene. At the outset, a foreman, Clark Gibson, associated himself with the group of employees who participated in the formation of the Independent. Apparently, to divert attention from himself, Clark Gibson delegated the task of providing a meeting place for those interested in organizing a labor organization limited to the respondent's employees to his assistant, Lundy Groves, and his wife. The first organizational meeting of the Independent was held at the home of Lundy Groves. In addition to Lundy Groves, other supervisory employees, including Carm Reese and Ancel Smith, played prominent roles in the formation and administration of the Independent's affairs. The Independent was organized under the guidance of B. E. Thompson who furnished his services as a result of a suggestion of Weese, a person identified with management. Thereafter, Thompson became business

Furthermore, the Independent lent itself to the respondent as an aid in the back-to-work movement in opposition to the Union.

[fol. 22] The respondent and the Independent contend that the settlement agreements and the consent election preclude a consideration of the events occurring prior to the making of the settlement. In support of their contentions, the respondent and the Independent cite, among others, the decisions of the Board in Matter of Wickwire Brothers[35] and Matter of Hope Webbing Company.[36] But since in neither case was there a continuation of the practices which preceded the settlement, or the election agreement, or both, as the case may be, these cases are not apposite if, here, after the making of the settlement agreements, contrary to its undertaking therein, the respondent engaged in further unfair labor practices.[37] The issue remains whether, by entering into the closed-shop contract with the Independent with knowledge that the Independent intended to exclude employees from membership and by discharging employees denied membership in the Independent, as set forth above, the respondent violated the Act. The respondent contends that it was bound to enter into a closed-shop contract by the terms of the election agreement between the respondent, the Union, and the Independent, and urges the Board to regard the discharges as proper since made pursuant to the closed-shop contract.

We do not agree. An employer may not enter into a closed-shop contract which to his knowledge is designed to operate as an instrument for effecting discrimination against his employees solely because of their prior union [fol. 23] activities. The proviso in Section 8 (3) of the

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[35] Matter of Wickwire Brothers and Amalgamated Ass'n of Iron, Steel & Tin Workers of North America, Lodge #1985, through S. W. O. C., affiliated with the C. I. O., 16 N. L. R. B. 316.

[36] Matter of Hope Webbing Company and Textile Workers Organizing Committee of the C. I. O., Local No. 14, 14 N. L. R. B. 55.

[37] See, for example, N. L. R. B. v. Hawk & Buck Co., Inc.,

Act [38] permits an employer to enter into an agreement with the duly designated representative of his employees, requiring membership in that organization as a condition of employment. It is true that under the terms of the election agreement the respondent was bound to execute a union-shop contract with the victorious union. It by no means follows, however, that the respondent was also bound by the election agreement to acquiesce in a scheme to penalize employees whose choice of representatives was not that of the majority; nor can the proviso in Section 8 (3) be thought to countenance such a result.

As we have recently said "the proviso relating to the closed shop is not a severable and separate portion of the Act. It must be construed in the light of the statutory statements of policy and the general provisions of the Act * * * The express purpose of the Act is to insure employees of their right of self-organization and a free choice of representatives." [39]

In the recent Rutland Court case, we held that a closed-shop contract does not justify an employer in discharging employees whom he knows the contracting union has expelled from membership simply because they sought to

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[38] Section 8 of the Act provides, in part:

It shall be an unfair labor practice for an employer—

(1) * * *

(2) * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act * * * shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

[39] Matter of Rutland Court Owners, Inc., and United Construction Workers Organizing Committee, Local 120, et al., 46 N. L. R. B., No. 117.

exercise their statutory right to designate a new representative for future bargaining. Under an analogous situation, [fol. 24] we held in the Henri Wines case [40] that knowledge on the part of an employer of a union's intention not to admit his employees to membership precludes the execution of a valid closed-shop contract with that labor organization, since it would be a device for depriving of their jobs certain employees whose union activity had offended him.

The closed-shop contract in the instant case was not intended merely to require employees to seek membership in the Independent as a condition of employment. The facts in the case make it apparent that the respondent was put on notice that its real purpose was to bar from future employment with the respondent persons who had adhered to the charging Union in the election campaign. While the tripartite agreement of January 13, 1942, may have been valid when made, performance of its terms did not require the respondent knowingly to become a party to the Independent's plan to eliminate from the respondent's pay roll employees solely because of their past union activities.[41] On the contrary, when this unlawful scheme became known to it, the respondent not only had a right to abrogate the tripartite agreement, but also was under an affirmative obligation to do so. So viewed, the doctrine of the Henri Wines case is applicable. Under these circumstances, the close-shop agreement cannot be deemed a defense, but a discriminatory device to insure perpetuation of the Independent and thus deprive employees of their statutory right to select bargaining representatives.

As we have found that unfair labor practices were committed by the respondent after as well as before the settlement agreements, it is clear that the Board's consideration

[40] Matter of Monsieur Henri Wines, Ltd., et al., and Distillery, Rectifying & Wine Workers International Union of America, Local #1, A. F. of L., party to the contract, 44 N. L. R. B. 1310.

[41] Cf. the many situations in the field of commercial transactions where, by reason of supervening prohibition or prevention by law, performance of a contract cannot be compelled since it would involve a violation of law. See, for example, 17 Corpus Juris Secundum, Sec. 467; 6 Williston on Contracts (Rev. Ed.), Sec. 1938.

[fol. 25] of the events preceding the settlement agreements is consistent with the principles enunciated in the cases relied on by the respondent and the Independent.[42]

The Trial Examiner also found that the respondent had engaged in unfair labor practices by Wallace's telegram of January 23 and by certain allegedly coercive remarks of supervisory employees made between the date of the settlement agreement and the date of the election. We do not agree with the Trial Examiner. The telegram had come to the knowledge of the Regional Director prior to the election; nevertheless, he proceeded with the election, found it to be a fair one, and certified the Independent. The Union had knowledge of these alleged unfair labor practices but filed no objections to the election or to the Regional Director's certification. For these reasons we think that such interference, if any, was too trivial to justify setting aside the settlement.

We find that, by all the foregoing, the respondent dominated and interfered with the formation and administration of, and contributed support to, the Independent, and interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act. Since the respondent's closed-shop contract with the Independent, dated March 7, 1942, contrary to their contention, falls outside the proviso to Section 8 (3) of the Act, the contract affords no protection to the discharge of employees[43] pursuant to its provisions. We further find that, by discharging the 43 employees named in Appendix A because of their membership in and activities on behalf of the Union and because they did not belong to the Independent, the respondent discriminated with respect to their hire and tenure of employment and conditions of employment, and thereby encouraged membership in the Independent and discouraged membership in the Union.

[fol. 26] IV. The Effect of the Unfair Labor Practices upon Commerce

The activities of the respondent set forth in Section III, above, occurring in connection with the operations of the

[42] See footnotes 35 and 36, supra.

[43] Including the 12 employees who had not applied for membership in the Independent.

respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the respondent has engaged in unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

We have found that the respondent has dominated and interfered with the formation and administration of the Independent and has contributed support thereto. The effects and consequences of the respondent's domination, interference with, and support of the Independent, as well as the continued recognition of the Independent as the bargaining representative for its employees, constitute a continuing obstacle to the free exercise by its employees of their right to self-organization and to bargain collectively through representatives of their own choosing. Because of the respondent's illegal conduct with regard to the Independent, it is incapable of serving the respondent's employees as a genuine collective bargaining agency. Moreover, the continued recognition of the Independent would be obstructive of the free exercise by the employees of the rights guaranteed to them by the Act. Accordingly we shall order that the respondent disestablish and withdraw all recognition from the Independent as representative of any of its employees for the purposes of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of [fol. 27] employment.[11] The contract entered into between the respondent and the Independent and the contractual relationship existing thereunder have been the means

[11] See, for example, N. R. L. B. v. Link-Belt Co., 311 U. S. 584; H. J. Heinz Co. v. N. L. R. B., 311 U. S. 514, aff'g 110 F. (2d) 843 (C. C. A. 6) enf'g 10 N. L. R. B. 963; N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co., supra; N. L. R. B. v. The Falk Corporation, 308 U. S. 453, rev'g 106 F. (2d) 454, mod. 102 F. (2d) 383 (C. C. A. 7), enf'g 6 N. L. R. B. 654.

whereby the respondent has utilized an employer-dominated labor organization to frustrate self-organization and defeat genuine collective bargaining by its employees. Under these circumstances, any continuation, renewal, or modification of the existing contract would perpetuate the conditions which have deprived employees of the rights guaranteed to them by the Act and would render ineffectual the other portions of our remedial order. We shall therefore order the respondent to cease giving effect to any contract between it and the Independent, or to any modification or extension thereof. Nothing in this decision or in our order should be taken, however, to require the respondent to vary those wage, hour, and other substantive features of its relations with the employees themselves, if any, which the respondent established in performance of the contract as extended, renewed, modified, supplemented, or superseded.[45]

We have also found that the respondent discharged 43 employees named in Appendix A because of their union activities. We shall order, therefore, that the respondent offer the aforesaid 43 employees immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to make them whole for any loss of pay they may have suffered by reason of the discrimination against them by payment to each of them of a sum of money equal to the amount which he normally would [fol. 28] have earned as wages from the date of such discrimination to the date of the offer of reinstatement, less his net earnings [46] during said period. However, back pay

[45] National Licorice Co. v. N. L. R. B., 309 U. S. 350, aff'g as mod. 104 F. (2d) 655 (C. C. A. 2), enf. as mod. 7 N. L. R. B. 537; N. L. R. B. v. J. Greenebaum Tanning Co., 110 F. (2d) 984 (C. C. A. 7), enf. as mod. 14 N. L. R. B. 300, cert. denied 311 U. S. 662.

[46] By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent, which would not have been incurred but for his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See Matter of Crossett Lumber Company and United

shall not accrue during the period from May 1, 1943, the date the Board vacated its previous Decision and Order herein, to the date of issuance of the instant Decision and Order.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the Board makes the following:

Conclusions of Law

1. Local Union No. 129, United Construction Workers Organizing Committee, affiliated with the Congress of Industrial Organizations, and Richwood Clothespin and Dishworkers' Union are labor organizations, within the meaning of Section 2 (5) of the Act.

2. By dominating and interfering with the formation and administration of the Independent, and by contributing support to it, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (2) of the Act.

3. By discriminating in regard to the hire and tenure of the 43 employees named in Appendix A, and thereby encouraging membership in the Richwood Clothespin and Dishworkers' Union, and discouraging membership in Local Union No. 129, United Construction Workers Organizing Committee, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (3) of the Act.

[fol. 29] 4. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers Union, Local 2590, 8 N. L. R. B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. See Republic Steel Corporation v. N. L. R. B., 311 U. S. 7.

6. The respondent, B. E. Thompson, is not an employer within the meaning of Section 2 (2) of the Act.

ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, The Wallace Corporation, Richwood, West Virginia, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Dominating or interfering with the administration of Richwood Clothespin and Dishworkers' Union, or the formation or administration of any other labor organization of its employees, or from contributing support to said labor organization or any other labor organization of its employees;

(b) Recognizing Richwood Clothespin and Dishworkers' Union as a representative of any of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment;

(c) Giving effect to its contract, dated March 7, 1942, with Richwood Clothespin and Dishworkers' Union, or to any extension, renewal, or modification thereof, or to any other contract or agreement between the respondent and the said labor organization which may now be in force;

[fol. 30] (d) Encouraging membership in Richwood Clothespin and Dishworkers' Union, or any other labor organization of its employees, and discouraging membership in Local Union No. 129, United Construction Workers Organizing Committee, affiliated with the Congress of Industrial Organizations, or any other labor organization of its employees, by discharging any of its employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment;

(e) In any other manner interfering with, restraining or coercing its employees in the exercise of the right of self-organization, to form, join, or assist labor organizations, to

bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining, or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Withdraw all recognition from, and completely disestablish, Richwood Clothespin and Dishworkers' Union as a representative of any of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment;

(b) Offer the 43 employees named in Appendix A immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges;

(c) Make whole the 43 employees named in Appendix A for any loss of pay they may have suffered by reason of the respondent's discrimination against them, by payment to each of them of a sum of money equal to the amount which [fol. 31] he normally would have earned as wages from the date of the discrimination to May 1, 1943, and from the date of issuance of this Decision and Order to the date of the respondent's offer of reinstatement, less his net earnings during said period;

(d) Post immediately in conspicuous places throughout its plant in Richwood, West Virginia, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a), (b), (c), (d), and (e) of this Order; (2) that it will take the affirmative action set forth in paragraphs 2 (a), (b), and (c) of this Order; and (3) that the respondent's employees are free to become or remain members of Local Union No. 129, United Construction Workers Organizing Committee, affiliated with the Congress of Industrial Organizations, and that the respondent will not discriminate against any employee because of membership in or activity in behalf of that organization;

(e) Notify the Regional Director for the Ninth Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith.

And It Is Further Ordered that the complaint be, and it hereby is, dismissed as to B. E. Thompson.

Signed at Washington, D. C., this 7th day of June 1943.

Gerard D. Reilly, Member; John M. Houston, Member, National Labor Relations Board. (Seal.)

[fol. 32] APPENDIX A

Myrtle Bennett	Mable Hinkle
Ida Berry	Janie Hopkins
Red Brashaw	Gillie Lewis
Ella Brown	Cecil Little
Loy Coffman	Ada Lockhart
Juanita Cogar	Fannie Logar
Kenneth Cruse	Millie Logar
Nellie Cumes	Gay McClure
Claudie Dean	Kelse Meadows
Ellen Dean	Lilly Mollhan
Harvey Dodrill	Eugene Moore
Ora Dodrill	Dorothy Nutter
Roxie Dodrill	Jack Prescott
Dalla Dotson	Mildred Ross
Mary Facemeyer	Ida Ruley
Garnett Frame	Pearl Stewart
Cicero Godfrey	Grace Trimble
Carrie Griffie	Ray Tulver
W. D. Griffie	Carl Williams
Glenna Hannah	Hazel Williams
Jimmie Harris	Bill Willison
Harold Harris	

[fol. 33] CHAIRMAN HARRY A. MILLIS, specially concurring:

I concur in the Decision and Order and agree with the views expressed therein, except as stated hereafter. I would also find that Wallace's telegram to Thompson dated January 23, 1942, contained an implied threat that the respondent might close its Richwood plant if the Union won the election.

and the employees so understood the telegram.[47] In addition, during the week immediately preceding the election, employees were warned by Foremen White and Sleeth that the respondent's log supply would be discontinued in the event that the Union won the election. I would find that, by the telegram and the statements of foremen set forth above, the respondent influenced the outcome of the election and thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

Signed at Washington, D. C., this 7 day of June 1943.

Harry A. Millis, Chairman, National Labor Relations Board.

[fol. 34] BEFORE THE NATIONAL LABOR RELATIONS BOARD, NINTH REGION

Case No. IX-C-1601

In the Matter of THE WALLACE CORPORATION and B. E. Thompson and Local Union No. 129, United Construction Workers Organizing Committee

COMPLAINT (as Amended at Hearing)

It having been charged by Local No. 129, United Construction Workers Organizing Committee, affiliated with the Congress of Industrial Organizations, that The Wallace Corporation, Richwood, West Virginia, herein referred to as "respondent Wallace" and B. E. Thompson, Richwood, West Virginia, herein referred to as "respondent Thompson" and jointly and severally referred to as "respondents" have engaged in and are now engaging in certain unfair labor practices affecting commerce as set forth and

[47] Since Wallace's second telegram to Thompson, dated January 25, did not retract the statements in the first telegram and did not receive equal publicity, the second telegram did not operate to dissipate the coercive effects of the first telegram. The Regional Director's action in proceeding with the election despite the presence of such coercive effects, contrary to a contention of the respondent and the Independent, does not estop the Board from taking steps deemed necessary to effectuate the policies of the Act.

defined in the National Labor Relations Act, 49 Stat. 449, herein referred to as the Act, the National Labor Relations Board, herein referred to as the Board, by the Regional Director for the Ninth Region, as agent of the Board, designated by the National Labor Relations Board Rules and Regulations—Series 2, as amended, Article IV, Section 1, hereby issues its complaint and alleges as follows:

[fol. 35] 1. Respondent Wallace is a West Virginia corporation, having its principal office and place of business in St. Louis, Missouri, with branch offices in Chicago, Illinois, and New York, New York, and plant offices in Richwood, West Virginia, and Wausau, Wisconsin. Respondent Wallace has at all times herein mentioned continuously engaged at its plant at Richwood, West Virginia, herein referred to as "Richwood Plant," in the manufacture, sale and distribution of wooden clothespins, spring clothespins, wooden butter plates, paper butter plates, and turned toys.

2. Respondent Wallace, in the course and conduct of its business as aforesaid, causes and has continuously caused a substantial part of the raw materials and products used in its aforesaid operations at its Richwood Plant to be delivered and transported in interstate commerce to its Richwood Plant, from and through states of the United States other than the State of West Virginia; and causes and has continuously caused a greater part of the products manufactured, sold and distributed by it in its business at its Richwood Plant as aforesaid, to be delivered and transported from its Richwood Plant to and through states of the United States other than the State of West Virginia.

3. Respondent Wallace is engaged in commerce within the meaning of Section 2 (6) of the Act.

4. United Construction Workers Organizing Committee, and Local No. 129 thereof, affiliated with the Congress of Industrial Organizations, herein called the United, and The Richwood Clothespin and Dishworkers Union, herein called the Independent, are labor organizations within the meaning of Section 2 (5) of the Act.

5. Respondent Thompson has at all times herein mentioned resided in Richwood, West Virginia, and each and every act done by Thompson herein described was done in

[fol. 36] the interest of respondent Wallace. Respondent Thompson is an employer within the meaning of Section 2 (2) of the Act.

6. The respondents herein have at all times herein mentioned consulted each with the other, given advice and assistance and aided and abetted each other in the divers and sundry acts set forth herein as having been and being done by an individual respondent.

7. Since about July 1, 1941, respondents have engaged in a plan and continuous course of conduct designed to and which has interfered with, restrained, and coerced the employees at the Richwood Plant in their rights to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining, and other mutual aid or protection.

8. Respondent Wallace, through its officers, agents and employees, including Thompson, and respondent Thompson, at all times after July 1, 1941, interfered with, restrained, and coerced the employees at the Richwood Plant in the exercise of the rights guaranteed them in Section 7 of the Act, by engaging in the following acts and conduct:

a) Urging, persuading and warning said employees to join the Independent and/or to refrain from aiding, becoming or remaining members of the United:

b) Making disparaging and derogatory remarks to said employees about the United:

c) Stating to said employees that respondent Wallace would cease operating the Richwood Plant if the United succeeded in organizing the employees:

d) Disparaging and vilifying to said employees the United and the United's leaders and organizers:

[fol. 37] e) Stating to said employees that even if the United obtained a majority of the employees, respondent Wallace would never recognize it as the bargaining agent:

f) Keeping under surveillance the activities, meetings, and meeting places of the United:

g) Attempting to induce members of the United to resign from the United, and to refrain from concerted activities:

h) Seizing the United's identification badges from the persons of the United's members:

i) Bribing said employees to vote for the Independent and against the United at the election conducted by the Board on January 30, 1942; and

j) Posting and distributing written material calculated to influence said employees to vote for the Independent and against the United at the Board election held January 30, 1942, and otherwise interfering with the free choice of said employees in the said election.

9. Respondent Wallace, by its officers, agents and employees, including respondent Thompson, while engaged at its Richwood Plant as described above, and respondent Thompson did, on or about October 2, 1941, initiate, form and sponsor a labor organization known as The Richwood Clothespin and Dishworkers Union, herein called the Independent, for the purpose of dealing with the employees of respondent Wallace concerning grievances, wages, rates of pay, hours of employment, or other conditions of employment, and at all times since said date respondents have dominated, contributed to the support of, and interfered with the administration of the said Independent.

10. Respondent Wallace, through its officers, foremen, assistant foremen, and other agents, including Thompson, [fol. 38] and respondent Thompson, have since the forming of the said Independent interfered with its administration by:

a) Soliciting and encouraging membership in the Independent during working hours and on company property:

b) Discouraging and warning employees against membership in or activities in behalf of, the United:

c) Holding office in the Independent:

d) Encouraging, soliciting, bribing, and in divers other ways encouraging its employees to vote for the Independent at the election conducted by the Board on January 30, 1942:

e) Engaging in divers and sundry other acts well known to respondents and more particularly set forth in paragraph 7:

f) Disparaging and vilifying to respondent Wallace's employees the United and the United's leaders and organizers:

g) Urging, persuading and warning said employees to join the Independent and to refrain from aiding, becoming or remaining members of the United:

h) Printing and circulating written material calculated to influence said employees to vote for the Independent at the election conducted by the Board on January 30, 1942, and at all other times to influence said employees to become members in the Independent and to refrain from becoming members in the United: and

i) Organizing, planning and assisting in the organization of the Independent and especially in defining qualifications for membership in the Independent as to defeat the United.

[fol. 39] 11. On or about March 18, 1942, respondent Wallace discharged and refused to reinstate the following named employees because they were members of the United and because they were not members of the Independent:

Ida Ruley	Nellie Kerns
W. D. Griffie	Gay McClure
Carrie Griffie	Carl Williams
Harvey Dodrill	Hazel Williams
Roxie Dodrill	Jack Trescott
Fannie Logar	Harold Harris
Molly Logar	Pearl Stewart
Mabel Hinkle	Ada Lockhart
Glenna Hanna	Cicero Godfrey
Ida Berry	Mildred Ross
Grace Trimble	Juanita Cogar
Ora Dodrill	Kelso Meadows
Lillie Mollhan	Eugene Moore
Myrtle Bennett	Kenneth Crews
Gillie Lewis	Ella Brown
Ellen Dean	Jimmie Harris
Claudie Dean	Bill Wilson
Garnett Frame	Ray Toliver

J. H. Bashaw
Loy Coffman
Janie Hopkins
Dorothy Nutter
Della Dottson
Cecil Lyttle
Mary Facemire

Respondent Wallace purported to act pursuant to an alleged agreement entered into between itself and the Independent on or about March 7, 1942, which said contract is alleged to provide that all its employees must be members of the Independent. If such contract in truth or in fact was ever consummated, it is illegal and void as having been made with a labor organization assisted by respondent Wallace and not the representative of the employees pursuant to Section 9 (a) of the Act.

12. By the acts and conduct set forth in paragraphs 7, 8, 9, 10, and 11, respondents have engaged in and are engag- [fol. 40] ing in unfair labor practices; within the meaning of Section 6 (1) of the Act.

13. By the acts and conduct set forth in paragraphs 7, 9, 10, and 11, respondents have engaged in and are engaging in unfair labor practices, within the meaning of Section 8 (2) of the Act.

14. By the acts and conduct set forth in paragraph 11, respondent Wallace has engaged and is engaging in unfair labor practices, within the meaning of Section 8 (3) of the Act.

15. The activities of respondents set forth above in paragraphs 7, 8, 9, 10, and 11, occurring in connection with the operations of respondent Wallace's business as described above in paragraphs 1, 2, and 3, have a close, intimate and substantial relationship to trade, traffic and commerce among the several states, and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

16. The aforementioned acts of respondents constitute unfair labor practices affecting commerce within the meaning of Section 8 (1), (2) and (3), and Section 2 (6) and (7) of the Act.

Wherefore, the National Labor Relations Board, on the 25th day of June, 1942, issues its complaint against the Wallace Corporation, and B. E. Thompson, respondents herein.

[fol. 41] BEFORE THE NATIONAL LABOR RELATIONS BOARD,
NINTH REGION

Case No. IX-C-1601

[Title omitted]

NOTICE OF HEARING

Please Take Notice that on the 9th day of July, 1942, at 10:00 o'clock in the forenoon, E. W. T., in the main Court Room, Nicholas County Court House, Second Floor, Summersville, West Virginia, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

A copy of the Charge upon which the Complaint is based is attached hereto.

You are further notified that you have the right to file with the Regional Director for the 9th Region, with offices at 445 U. S. Post Office and Court House, Cincinnati, Ohio, acting in this matter as agent of the National Labor Relations Board, an answer to the said Complaint, within ten (10) days from the service thereof.

Please Take Notice that duplicates of all exhibits which are offered in evidence will be required unless, pursuant to request or motion, the Trial Examiner in the exercise of his discretion and for good cause shown, directs that a given exhibit need not be duplicated.

[fol. 42] In Witness Whereof the National Labor Relations Board has caused this, its Complaint and Notice of Hearing, to be signed by the Regional Director for the Ninth Region on this 25th day of June, 1942.

Philip G. Phillips, Regional Director, National Labor Relations Board, Ninth Region. (Seal.)

Jun 25 1942, N. L. R. B., Ninth Region, Cincinnati.

BEFORE THE NATIONAL LABOR RELATIONS BOARD, NINTH REGION

Case No. IX C-1601

[Title omitted]

SECOND AMENDED CHARGE

Pursuant to Section 10(b) of the National Labor Relations Act, the undersigned hereby charges that (Full name of the company) The Wallace Corporation and B. E. Thompson at (Address of establishment) Richwood, West Virginia employing (Number) 225 workers in (Type of busi- [fol. 43] ness) clothes-pins, wood and paper dishes has engaged in and is engaging in unfair labor practices within the meaning of Section 8 subsections (1) and (3) of said Act, in that The Wallace Corporation by its officers, agents, and employees including B. E. Thompson, and B. E. Thompson have dominated and interfered with the formation and administration of the Richwood Clothespin and Dish Workers Union, and are dominating and interfering with said union, and in that on March 18th, 1942, the Wallace Corporation discharged forty-three (43) employees, namely: Ida Ruley, W. D. Griffie, Carrie Griffie, Harvey Dodrill, Roxie Dodrill, Fannie Logar, Molly Logar, Mabel Hinkle, Glenna Hanna, Ida Berry, Grace Trimble, Ora Dodrill, Lillie Mollhan, Myrtle Bennett, Gillie Lewis, Ellen Dean, Claudie Dean, Garnett Frame, Nellie Kerns, Gay McClure, Carl Williams, Hazel Williams, Jack Trescott, Harold Harris, Pearl Stewart, Ada Lockhart, Cicero Godfrey, Mildred Ross, Juanita Cogar, Kelso Meadows, Eugene Moore, Kenneth Crews, Ella Brown, Jimmie Harris, Bill Wilson, Ray Toliver, J. E. Bashaw, Loy Coffman, Janie Hopkins, Dorothy Nutter, Della Dottson, Cecil Lyttle, Mary Facemire, because they were members of UCWOC and because of the refusal of the Richwood Clothespin and Dishworkers Union and respondent Thompson acting in the interest of the Wallace Corporation to admit them as members.

By the acts set forth in the paragraphs above and by other acts and conduct the Wallace Corporation by its officers, agents and employees including B. E. Thompson, and B. E. Thompson interfered with, restrained, and coerced

the employees of the Wallace Corporation in the exercise of the rights guaranteed in section 7 of the said act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give [fol. 44] also the full name, local number and affiliation of organization, and name and official position of the person acting for the organization.)

Local Union 129, United Construction Workers Organizing Committee, by (S.) Geo. J. Titler, Associate Director, UCWOC, 703-A Virginia St. E., Charleston, West Virginia.

Subscribed and sworn to before me this 24th day of June, 1942. At Charleston, Kanawha, W. Va. (S.) Thomas E. Shroyer, Attorney, Ninth Region, N. L. R. B.

[fol. 45] Before the National Labor Relations Board, Ninth Region

Case No. IX-C-1601
Case No. IX-C-1662

[Title omitted]

Answer of Wallace Corporation

(For Exhibits A, B, D, and E and F hereof see Respondent's Exhibits 1, 2, 3, 4 and 5, post.)

I

Now comes The Wallace Corporation, a corporation of the State of Missouri, with a plant at Richwood, W. Va., and for answer to the Complaint herein, states as follows:

1—Respondent admits the allegations contained in paragraph 1 of the Complaint, with the exception of the statement that the Respondent is a West Virginia corporation duly qualified to do business in the State of West Virginia.

2—Respondent admits the allegations contained in paragraph numbered 2 of the Complaint.

3—Respondent admits that it is engaged in commerce within the meaning of Section 2(6) of the Act.

4—Respondent admits upon information and belief that the United Construction Workers Organizing Committee and Local 129 thereof, affiliated with the Congress of Industrial Organizations, and the Richwood Clothespin and Dish Workers Union are labor organizations within the meaning of Section 2(5) of the Act.

[fol. 46] 5—Respondent denies that each and every act done by respondent Thompson, described in the Complaint, was done in the interest of this respondent, and states that respondent Thompson has never been authorized at any time to act for this respondent.

6—Respondent denies that this respondent and respondent Thompson, consulted each with the other, gave advice and assistance, and aided and abetted each other in the divers and sundry acts set forth in the Complaint as having been and being done by the individual respondents.

7—Respondent denies that since about July 1, 1941, this respondent has engaged in a plan and continuous course of conduct designed to, and which has interfered with, restrained and coerced the employees at the Richwood plant and their rights to self organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining and other mutual aid or protection.

8—Respondent denies that Respondent Wallace, through its officers, agents and employees, and through respondent Thompson, after July 1, 1941, interfered with, restrained and coerced the employees at the Richwood plant in the exercise of rights guaranteed them under Section 7 of the Act by engaging in the acts and conduct lettered (a) to (j) inclusive under Count 8 of the Complaint.

9—Respondent denies that it did, on or about October 2, 1941, through respondent Thompson or otherwise, initiate, form and sponsor a labor organization known as the Richwood Clothespin and Dish Workers Union for the purpose of dealing with the employees of this respondent, concerning grievances, wages, rates of pay, hours of employment, or other conditions of employment, and respondent further

denies that at any time since said date it has dominated, contributed to the support of, and interfered with the ad-
[fol. 47] ministration of the said Richwood Clothespin and Dish Workers Union.

10—Respondent denies that it has, since the forming of said Richwood Clothespin and Dish Workers Union, through respondent Thompson or otherwise, interfered with its administration, and respondent denies that it did any of the acts referred to in subparagraphs (a) to (i) inclusive of paragraph 10 of the Complaint.

11—Respondent denies that on or about March 18, 1942, it discharged and refused to reinstate the employees named in paragraph 11 of the Complaint because they were members of the United Construction Workers Organizing Committee. Respondent states that most of the said named employees became ineligible for employment by respondent on or about March 18, 1942, and were laid off by respondent, Wallace Corporation, under the requirements of an agreement entered into with the Richwood Clothespin and Dish Workers Union on or about March 7, 1942, wherein it is provided that all employees of the respondent at its Richwood plant must be members of the Richwood Clothespin and Dish Workers Union.

Respondent denies that said contract is illegal and void as having been made with a labor organization assisted by it and not the representative of the employees pursuant to Section 9A of the Act. Respondent denies that it has assisted said Richwood Clothespin and Dish Workers Union.

12—Respondent, Wallace Corporation, denies each and every allegation contained in paragraphs numbered 12, 13, 14, 15 and 16 of the Complaint.

II

1—Further answering the Complaint in the above entitled proceeding, Respondent, The Wallace Corporation, states that the issues and allegations contained in the fore-
[fol. 48] going Complaint filed herein, and more particularly in paragraphs numbered 7 and 8 thereof, were the subject of a prior charge filed with the office of Philip G. Phillips, Regional Director of the Ninth Region of the National Labor Relations Board, of which this Respondent

was notified by the said Philip G. Phillips by letter of October 4, 1941, reading as follows:

"Wallace Corporation, October 4, 1941.
Richwood, W. Va.

Re: Case No. IX-C-1478

Gentlemen:

A charge has been filed with this office by the United Construction Workers Organizing Committee alleging that you have violated Sections 8 (1) and (3) of the National Labor Relations Act in that you have intimidated and coerced your employees in their union activities by taking concerted action to stop the organizational campaign of the said union, and that on or about August 26, 1941, you discriminatorily terminated the employment of Harvey Dodrell because of his activities in behalf of the said union.

This case has been assigned to our Mr. R. H. Cowdrill, who will get in touch with you shortly. Meanwhile, we would appreciate hearing from you your version of the facts.

Very truly yours, Philip G. Phillips, Regional Director."

2—Respondent further states that thereafter several conferences were held in the office of the said Philip G. Phillips, Regional Director, in connection with the matters and things hereinafter set forth in this Answer, and on or about the 19th day of January, 1942, the above mentioned charges referred to in the said letter of October 4, 1941, were withdrawn under an agreement, copy of which is hereto attached, marked Exhibit A, and incorporated herein by reference.

[fol. 49] 3—Respondent, The Wallace Corporation, states that it has fully complied with the said agreement of January 19, 1942, hereto attached as Exhibit A, and that therefore the charges contained in the Complaint, with the exception of the matter of the discharge of Harvey Dodrill, stand withdrawn and are not a proper subject for further complaint or charge on the part of the United Construction Workers Organizing Committee, or on the part of the National Labor Relations Board.

4—That the said agreement was reached after a long and bitter strike at respondent's Richwood plant, after investigation by the representatives of the National Labor Relations Board of the above charges and of charges of company domination of the Independent Union. The company, at the time said charges were so withdrawn, agreed to a consent election, having theretofore agreed to recognize as collective bargaining agent the union selected by a majority vote of its employees at an election under the auspices of the said National Labor Relations Board, which was in fact thereafter so held.

III

Further answering the Complaint herein, Respondent, Wallace Corporation, states as follows:

1—That on or about September 9, 1941, Respondent, Wallace Corporation, was requested to negotiate with representatives of the United Construction Workers Organizing Committee, with respect to hours, wages and working conditions at Respondent's Richwood plant, at which time respondent stated it would like to verify the statement of the said representatives that they represented a majority of the employes in said plant. On or about September 19, 1941, the representatives of the said United Construction Workers Organizing Committee offered to compare their membership list with the payroll which offer was refused [fol. 50] and an election, under the auspices of the National Labor Relations Board, was suggested. The said union representatives stated that the election would take two or three weeks and they wanted action and furthermore stated that if respondent refused to recognize a card count that the union would shut down the plant. On September 23, 1941, the said union was again advised that the company desired to have a secret election under the auspices of the National Labor Relations Board. On September 25th the union representatives again insisted upon a card count and that if the respondent insisted upon an election they would shut down the plant. A strike was called at 1:45 P. M. on September 25, 1941, as a result of the foregoing disagreement and the said strike continued up to January 13, 1942, during all of which time respondent's plant at Richwood, W. Va. was out of operation and production was completely stopped. The strike was accompanied by violence

and disturbance of the peace by persons unknown to respondent.

2—Respondent made numerous efforts to settle the strike and to reach an agreement as to a bargaining agent. On or about September 26, 1941, a representative of the United States Conciliation Service was contacted and a John E. Addicks of that service met with representatives of the parties in Charleston, W. Va. on or about October 3rd. The efforts of the Conciliation Service were without effect.

3—On or about October 3, 1941, this respondent was advised that the employees of the company were attempting to organize an independent union at Richwood. Upon information and belief said employees received advice as to formation of said union from outside sources, including representatives of National Labor Relations Board, Pittsburgh office.

4—Informal charges of company domination followed formation of the above mentioned independent union and on or about October 21st, respondent was advised that a [fol. 51] representative of the National Labor Relations Board would come to Richwood and investigate the charge of company domination and a purported examination was conducted by one Russell R. Miller. On or about October 30th respondent was advised that the United Construction Workers Organizing Committee was willing to have a Labor Board vote, but would not consent to placing any other union on the ballot.

5—After further negotiations between respondent, Local #129, U. C. W. O. C., and Richwood Clothespin and Dish Workers Union, an independent, an agreement was reached in the early hours of January 13, 1942, whereby all parties agreed to an election conducted by the National Labor Relations Board and it was agreed that the employees should return to work. Copy of the said agreement of January 13, 1942, is hereto attached and marked Exhibit B, and incorporated herein by reference.

6—Thereafter on or about the 19th day of January, 1942, representatives of the respondent, United Construction Workers Organizing Committee and the Richwood Clothespin and Dish Workers Union met in the office of Philip G. Phillips, Regional Director of the National Labor Rela-

tions Board, Ninth Region, and entered into the agreement dated January 19, 1942, copy of which is hereto attached and marked Exhibit A.

7—That on the same date, to-wit: January 19, 1942, there was drawn up in the office of the said Philip G. Phillips an "Agreement for Consent Election" under the caption of "Case IX-R-658", copy of which is hereto attached and marked Exhibit D and by reference incorporated herein, calling for an election to determine the representation at said plant.

8—Thereafter, the said election having been held, said Philip G. Phillips, Regional Director of the National Labor [fol. 52] Relations Board, on or about the 4th day of February, 1942, made his report on the consent election in said case IX-R-658, and found and determined that the Richwood Clothespin and Dish Workers Union had been designated and selected by a majority of said employees in said unit as the exclusive bargaining agent for said unit. Copy of said report on consent election is attached hereto, marked Exhibit E, and by reference incorporated herein.

9—Thereafter the said Richwood Clothespin and Dish Workers Union, having been so designated as representative for collective bargaining, made certain demands upon this respondent with respect to wages, hours and working conditions, and after negotiations and the presentation of various alternative proposals of the parties, an agreement was reached on or about March 7, 1942, which agreement was reduced to writing in a "Contract of Agreement of March 7, 1942", copy of which is hereto attached and marked Exhibit F, and by reference incorporated herein.

10—Respondent, Wallace Corporation, states that in the course of negotiations of said agreement of March 7, 1942, the said Richwood Clothespin and Dish Workers Union (referred to in the Complaint and herein as the "Independent") insisted upon a "closed shop" or union shop agreement, citing the provisions of the agreement of January 13, 1942, to that effect. Respondent states that it was at all times reluctant, both in respect to the agreement of January 13, 1942, and the agreement of March 7, 1942, to enter into any closed or union shop agreement, feeling that the same was contrary to public policy and contrary to the best interests of respondent and its employees, and repeat-

edly protested the incorporation of any such clause; that United Construction Workers Organizing Committee representatives were particularly insistent upon such a clause in the above mentioned contract of January 13, 1942; that respondent similarly expressed its disapproval and pro-[fol. 53] tested the provisions of paragraph (e) of Article I of said agreement of March 7, 1942, between the respondent and the independent union, but after repeated attempts to reach an agreement, found it necessary to incorporate such a clause in the said agreement.

11—That thereafter, after the lapse of ten days as required in paragraph (e) of Article I of said agreement of March 7, 1942, this respondent determined that a number of its employees had failed to join the said independent union and they thereupon became ineligible for employment under the terms of said agreement and were laid off. Respondent, upon information and belief, states that of the employees listed in paragraph 11 of the Complaint, some did not apply for membership in the said union or for employment with the respondent, it being not fully advised at this date and so being unable to be more specific in that respect. Respondent states, upon information and belief, that the persons named in paragraph 11 of the complaint include all of those who were laid off at the said date because of ineligibility under the terms of the said contract.

12—Respondent further states that the discontinuance of employment of the employees of respondent so laid off pursuant to said contract, seriously interfered with its operations and was otherwise detrimental, in the opinion of respondent, to its operations, and respondent accordingly, on and after March 17, 1942, made repeated efforts to induce the said Richwood Clothespin and Dish Workers Union to permit employment of the said employees at respondent's plant; that representatives of respondent met with representatives of the said independent union at the office of the Regional Director of the National Labor Relations Board in Cincinnati, Ohio, for the purpose of reaching some amicable settlement of this matter, at which time [fol. 54] the attitude of the respondent in favor of the employment of said employees was made clear to all concerned.

13—Respondent further states that at all times herein mentioned and at all times mentioned in the Complaint, it has endeavored to deal fairly with the representatives of its employees, without discrimination as between the union organizations; that upon information and belief the present Complaint is filed for the purpose of securing re-employment of the employees named in the charge and in the Complaint and for no other purpose; that this respondent has at all times used its best efforts to secure the reemployment of the said employees.

Wherefore respondent Wallace Corporation says that the Complaint herein is improperly brought and by reason of the matters and things aforesaid, said Respondent prays that the Complaint herein be forthwith dismissed.

The Wallace Corporation, By M. B. Wallace, Jr., President.

R. Walston Chubb, Attorney for The Wallace Corporation.

[fol. 55] *Duly sworn to by M. B. Wallace, Jr. Jurat omitted in printing.*

[fol. 56] BEFORE THE NATIONAL LABOR RELATIONS BOARD, NINTH REGION

Case No. IX-C-1601

Case No. IX-C-1662

[Title omitted]

MOTION TO DISMISS OF RESPONDENT THE WALLACE CORPORATION

(For Exhibits A, B, D, E and F Hereof See Respondent's Exhibits 1, 2, 3, 4 and 5, Post)

Now comes The Wallace Corporation, a corporation of the State of Missouri, respondent in the above-entitled proceeding, and moves to dismiss the Complaint filed herein and the charges accompanying the same, upon the following grounds: (1) that all of the issues presented by paragraphs numbered 5, 6, 7, 8, 9 and 10 of the Complaint

alleging unfair labor practices since on or about July 1, 1941, on the part of this respondent have been heretofore settled by agreements made between respondent Wallace Corporation, Local #129 of U. C. W. O. C. complainant, and Richwood Clothespin & Dish Workers Union, hereinafter sometimes called the Independent, and approved by the National Labor Relations Board, all as hereinafter more particularly set forth; that the said agreements were entered into in good faith by all parties in an effort to settle a strike at the respondent's Richwood plant extending from September 25, 1941, to January 13, 1942, and un- [fol. 57] der circumstances where all the parties, including the National Labor Relations Board representatives were or should have been fully advised of the facts and circumstances surrounding such settlements; that it is contrary to the announced policy of the National Labor Relations Board to reopen settlements made under such circumstances or to permit any party thereto to repudiate the same, and is likewise contrary to public policy and elementary principles of fair dealing. (2) That with respect to the issues presented by paragraph 11 of the said Complaint, alleging discriminatory discharge of certain employees therein named, the said employees, or such of them as were in fact laid off, became ineligible for employment under the provisions of a contract made by this respondent in good faith with the representatives of the Richwood Clothespin and Dish Workers Union, the independent named in the Complaint, after the said Independent had been duly certified by the National Labor Relations Board on or about the 4th day of February, 1942, as the exclusive bargaining representative of the employees of the respondent's plant at Richwood, W. Va., after an election in which the said union was designated and selected as such by a majority of the employees of said unit at a consent election conducted by the said National Labor Relations Board, all as is more particularly set forth below.

In support of the foregoing general allegations, respondent states more particularly as follows:

1. That on or about September 9, 1941, respondent Wallace Corporation, was requested to negotiate with representatives of the United Construction Workers Organizing Committee, with respect to hours, wages and working

conditions at respondent's Richwood plant, at which time respondent stated it would like to verify the statement of the said representatives that they represented a majority [fol. 58] of the employees in said plant. On or about September 19, 1941, the representatives of the said United Construction Workers Organizing Committee offered to compare their membership list with the payroll which offer was refused and an election, under the auspices of the National Labor Relations Board, was suggested. The said union representatives stated that the election would take two or three weeks and they wanted action and furthermore stated that if respondent refused to recognize a card count that the union would shut down the plant. On September 23, 1941, the said union was again advised that the company desired to have a secret election under the auspices of the National Labor Relations Board. On September 25th the union representatives again insisted upon a card count and that if the respondent insisted upon an election they would shut down the plant. A strike was called at 1:45 P. M. on September 25, 1941, as a result of the foregoing disagreement and the said strike continued up to January 13, 1942, during all of which time respondent's plant at Richwood, W. Va., was out of operation and production was completely stopped. The strike was accompanied by violence and disturbance of the peace by persons unknown to respondent.

2. Respondent made numerous efforts to settle the strike and to reach an agreement as to a bargaining agent. On or about September 26, 1941, a representative of United States Conciliation Service was contacted and a John E. Addicks of that service met with representatives of the parties in Charleston, W. Va., on or about October 3rd. The efforts of the Conciliation Service were without effect.

3. On or about October 3, 1941, this respondent was advised that the employees of the company were attempting to organize an independent union at Richwood. Upon information and belief said employees received advice as to formation of said union from outside sources, including [fol. 59] representatives of the National Labor Relations Board, Pittsburgh office.

4. Informal charges of company domination followed formation of the above mentioned independent union and

on or about October 21st, respondent was advised that a representative of the National Labor Relations Board would come to Richwood and investigate the charge of company domination and a purported examination was conducted by one Russell R. Miller. On or about October 30th respondent was advised that the United Construction Workers Organizing Committee was willing to have a Labor Board vote, but would not consent to placing any other union on the ballot.

5. After further negotiations between respondent, Local #129, U. C. W. O. C., and Richwood Clothespin and Dish Workers Union, an independent, an agreement was reached in the early hours of January 13, 1942, whereby all parties agreed to an election conducted by the National Labor Relations Board and it was agreed that the employees should return to work. Copy of said agreement of January 13, 1942, marked Exhibit B, is attached to this Respondent's Answer filed herein and by reference is incorporated in this Motion.

6. Thereafter on or about the 19th day of January, 1942, representatives of the respondent, United Construction Workers Organizing Committee and the Richwood Clothespin and Dish Workers Union met in the office of Philip G. Phillips, Regional Director of the National Labor Relations Board, Ninth Region, and entered into the agreement dated January 19, 1942, copy of which agreement, marked Exhibit A, is attached to this Respondent's Answer filed herein, and by reference is incorporated in this Motion.

7. That on the same date, to-wit: January 19, 1942, there was drawn up in the office of the said Philip G. Phillips [fol. 60] an "Agreement for Consent Election" under the caption of "Case IX-R-658", calling for an election to determine the representation at said plant. Copy of said "Agreement for Consent Election", marked Exhibit D, is attached to this Respondent's Answer filed herein and by reference is incorporated in this Motion.

8. Thereafter, the said election having been held, said Philip G. Phillips, Regional Director of the National Labor Relations Board, on or about the 4th day of February, 1942, made his report on the consent election in said case IX-R-658, and found and determined that the Richwood Clothespin and Dish Workers Union had been designated

and selected by a majority of said employees in said unit as the exclusive bargaining agent for said unit. Copy of said report on consent election, marked Exhibit E, is attached to this Respondent's Answer filed herein, and by reference is incorporated in this Motion.

9. Thereafter the said Richwood Clothespin and Dish Workers Union, having been so designated as representative for collective bargaining, made certain demands upon this respondent with respect to wages, hours and working conditions, and after negotiations and the presentation of various alternative proposals of the parties, an agreement was reached on or about March 7, 1942, which agreement was reduced to writing in a "Contract of Agreement of March 7, 1942. Copy of said agreement, marked Exhibit F, is attached to this Respondent's Answer filed herein, and by reference is incorporated in this Motion.

10. Respondent, Wallace Corporation, states that in the course of negotiations of said agreement of March 7, 1942, the said Richwood Clothespin and Dish Workers Union (referred to in the Complaint and herein as the "Independent") insisted upon a "closed shop" or union shop agreement, citing the provisions of the agreement of Jan- [fol. 61] uary 13, 1942, to that effect. Respondent states that it was at all times reluctant, both in respect to the agreement of January 13, 1942, and the agreement of March 7, 1942, to enter into any closed or union shop agreement, feeling that the same was contrary to public policy and contrary to the best interests of respondent and its employees, and repeatedly protested the incorporation of any such clause; that United Construction Workers Organizing Committee representatives were particularly insistent upon such a clause in the above mentioned contract of January 13, 1942; that respondent similarly expressed its disapproval and protested the provisions of paragraph (e) of Article I of said agreement of March 7, 1942, between the respondent and the independent union, but after repeated attempts to reach an agreement, found it necessary to incorporate such a clause in the said agreement.

11. That thereafter, after the lapse of ten days as required in paragraph (e) of Article I of said agreement of March 7, 1942, this respondent determined that a number of its employees had failed to join the said independent

union and they thereupon became ineligible for employment under the terms of said agreement and were laid off. Respondent, upon information and belief, states that of the employees listed in paragraph 11 of the Complaint, some did not apply for membership in the said union or for employment with the respondent, it being not fully advised at this date and so being unable to be more specific in that respect. Respondent states, upon information and belief, that the persons named in paragraph 11 of the Complaint include all of those who were laid off at the said date because of ineligibility under the terms of the said contract.

12. In view of the foregoing, neither the United Construction Workers Organizing Committee, Local #129, nor the National Labor Relations Board has any right to complain of unfair labor practices alleged in the complaint prior [fol. 62] to January 19, 1942, the date of the agreement between the Independent, U. C. W. O. C. Local #129, and this respondent and the date of the approval thereof by the National Labor Relations Board.

Wherefore, and by reason of the matters herein set forth, respondent Wallace Corporation moves that the Complaint and charges upon which said Complaint is based be forthwith dismissed.

The Wallace Corporation, by M. B. Wallace, Jr.

R. Walston Chubb, Attorney for Respondent, The Wallace Corporation, 208 N. Broadway, St. Louis, Mo.

Duly sworn to by M. B. Wallace, Jr. Jurat omitted in printing.

[fol. 63] RESPONDENT WALLACE CORPORATION'S EXHIBIT 1

United States of America

BEFORE THE NATIONAL LABOR RELATIONS BOARD, 9TH REGION

Case No. IX-C-1478

WALLACE CORPORATION, Richwood, W. Va.,

and

UNITED CONSTRUCTION WORKERS ORGANIZING COMMITTEE

AGREEMENT

Whereas there has heretofore been filed a charge with the National Labor Relations Board, 9th Region, by the undersigned charging party alleging that the undersigned employer has engaged in certain unfair labor practices;

Whereas the parties hereto, with the consent and approval of the Regional Director of said Region, wish to dispose of such charges in a mutually satisfactory manner;

Now, Therefore, the undersigned employer agrees without in anywise admitting that it has in any manner violated the National Labor Relations Act, on condition that the undersigned charging party agrees to withdraw the charge:

(1) In no wise to interfere with, restrain or coerce its employees in the rights guaranteed in Section 7 of the National Labor Relations Act;

(2) In no wise to dominate or interfere with the administration of the Richwood Clothespin and Dish Workers Union, or any other union, and to further post the attached notice for thirty (30) days and write a letter similar to the attached letter to its foremen;

[fol. 64] (3) To return Harvey Dowdrill to a position substantially equivalent to the one formerly held, without loss of his seniority or other rights if so directed by the Regional Director for the 9th Region;

(4) To notify the Regional Director for the 9th Region within ten (10) days what steps have been taken to comply with this Agreement.

The undersigned charging party agrees to:

Request withdrawal and hereby does request withdrawal of said charge on condition that the undersigned employer fully and faithfully complies with this agreement and with said notice.

Dated this 19th day of January 1942.

Wallace Corporation, by M. B. Wallace, Title: Pres.
United Construction Workers Organizing Committee, by Geo. J. Titler, Title Org.

Approved: Philip G. Phillips, Regional

[fol. 65] Respondent Wallace Corporation's Exhibit 2

Agreement.

This Agreement made and entered into this the 13th day of January, 1942, by and between Local Union #129 U. C. W. A. and the Richwood Clothespin and Dish Workers Union, hereinafter referred to as the Unions, and The Wallace Corporation, hereinafter referred to as the Company, agree as follows:

It is agreed by all parties that work will be resumed at 8:00 o'clock A. M. as of today, at The Wallace Corporation factory located in Richwood, West Virginia, and that all Employees of The Wallace Corporation agree to return to work; and that, except for causes beyond Company control such as inability to secure raw materials, supplies and orders necessary for normal operation, operation of the factory will be continued without interruption by any of said parties pending a vote to be conducted by the National Labor Relations Board for the purpose of determining which Union represents a majority of the Company's employees for collective bargaining purposes.

The Company agrees not to coerce or intimidate any of its employees in regard to Union membership, and further agrees that none of its foremen or any other of its employees not eligible to be Union members shall exercise such coercion, intimidation or solicitation for either Union. Both Unions agree that they will refrain from all forms of intimidation or coercion, and both Unions agree to refrain from solicitation of membership during working hours.

[fol. 66] The Company agrees to recognize as exclusive bargaining agency whichever Union is proven by a vote con-

ducted by the National Labor Relations Board to represent a majority of its employees, and to start negotiations immediately after result of such election is determined.

The Company further agrees that if either Union is proven to represent a majority of its employees by said vote, it will recognize a Union Shop, providing that the Company shall at all times retain the right to suspend, hire or discharge any employee for proper and just cause.

The Company further agrees to make retroactive to this date all provisions with regard to wages which may hereafter be made a part of any collective bargaining agreement.

With reference to the case of Harvey Dodrill now pending before the National Labor Relations Board. The Company agrees with Local Union #129 U. C. W. A. as follows:

first, The Company agrees to abide by the decision of the National Labor Relations Board in this case, and

second, If Local Union #129 U. C. W. A. is recognized as bargaining agent, Harvey Dodrill will be re-employed by the Company at work he is best suited for, and the Company will reimburse him for time lost from this date at the rate he was paid during his last full working week.

It is agreed that those eligible to vote in said election will be those employed by the Company at the time the factory was closed.

[fol. 67] In witness whereof all parties mentioned above hereunto affix their signatures.

The Wallace Corporation, by M. B. Wallace, Jr., Wm. T. Christmas. Local Union #129 U. C. W. A., by Harvey Dodrill, Michael Goheem, M. D. Griffie, W. J. Farmer Rep. Richwood Clothespin and Dish Workers Union, by Carm Reese, Lundy Groves, Kathleen Conley, Ancil Smith.

[fol. 68] RESPONDENT WALLACE CORPORATION'S EXHIBIT 3

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD, NINTH REGION

Case No. IX-R-658

In the Matter of THE WALLACE CORPORATION and RICHWOOD CLOTHESPIN & DISH WORKERS UNION

AGREEMENT FOR CONSENT ELECTION

This Agreement, made and entered into this 19th day of January, 1942, by and among The Wallace Corporation, Richwood, West Virginia (herein call the Employer), and Richwood Clothespin & Dish Workers Union (herein called the Independent), and United Construction Workers Organizing Committee, Local 129, affiliated with the C. I. O. (herein called the C. I. O.).

A Petition for Investigation and Certification of Representatives, pursuant to Section 9 (c) of the National Labor Relations Act (herein called the Act), having been filed by the Petitioner with the Regional Director for the Ninth Region of the National Labor Relations Board (herein called the Regional Director and the Board, respectively), alleging that a question has arisen in respect to the representation for purposes of collective bargaining of certain employees of the Employer;

[fol. 69] It is Hereby Agreed as Follows:

I. Unit

All hourly paid employees, excluding foremen, watchmen, officers and salaried employees, and those having the right to hire and fire.*

(herein called the Unit) constitute a unit appropriate for the purpose of collective bargaining.

* Attached hereto, and marked Exhibit "A" is a list of all employees who, all sides agree, constitute a list of eligible voters in the election to be held under this agreement.

II. Secret Ballot

An election by secret ballot shall be conducted under the direction and supervision of the Regional Director among all employees in the Unit who were employed by the Employer during the pay-roll period ending September 27, 1941, including employees who did not work during such pay-roll period because they were ill or on vacation or in the active military service or training of the United States or temporarily laid off, but excluding employees who have since quit or been discharged for cause, to determine whether they desire to be represented for purposes of collective bargaining by the Independent, by the C. I. O. or by neither (none) of these.

III. Procedure

Said election shall be held in accordance with the Act, the Rules and Regulations, and the customary procedures and policies of the Board; provided that the determination of the Regional Director shall be final and binding upon any question (including questions as to the eligibility of voters) raised by any party hereto relating in any manner to the election and not specifically covered in this Agreement.

[fol. 70]

IV. Time and Place

The election shall be held at the American Legion Hall, Richwood, West Virginia, and the polls shall be open between the hours of 1:00 and 4:00 P. M. on January 30, 1942. Employees will not lose pay while voting.

V. Notices of Election

The Regional Director shall prepare and supply to the parties hereto at least three days before the election "Notices of Election" describing the manner and conduct of the election to be held and incorporating therein a sample ballot. The Employer, upon the request of and at a time designated by the Regional Director, will post such "Notices of Election" at conspicuous and usual posting places easily accessible to the eligible voters.

VI. Observers

The ballots shall be handled and the votes shall be counted and tabulated as soon after the election as feasible by the

Regional Director, or his agent or agents. Each party hereto will be allowed to station an equal number of authorized observers, selected from among the non-supervisory employees of the Employer, at the polling place during the election to assist in its conduct, to challenge the eligibility of voters and to verify the tally. Upon the conclusion of the counting the Regional Director shall supply a copy of the tabulation of votes to each party's observers.

VII. Eligible List

At least three days before the election the Employer will furnish to the Regional Director an accurate list of all of the eligible voters as described in Sections I and II above, together with a list of the employees, if any, specifically excluded from eligibility by such Sections.

[fol. 71] VIII. Objections

Objections to the conduct of the ballot or to a determination of representatives based on the results thereof, may be filed with the Regional Director within five (5) days after the closing of the polls and copies of such Objections must be served upon the other parties. If Objections are duly filed, the Regional Director shall promptly investigate the matters contained in such Objections.

IX. Election Report

The Regional Director shall, upon the completion of his investigation of the Objections, if any, or otherwise upon the expiration of the period within which Objections may be filed, issue a Report on Consent Election. Such Report shall contain a tally of the results of the ballot and the Regional Director's rulings, if any, on challenged ballots and Objections. If Objections are sustained, the Regional Director may, in his Report, include an Order voiding the results of the election and in that event shall be empowered to conduct a new election under the terms and provisions of this Agreement at a date, time, and place to be determined by him. If Objections are overruled, or if none have been filed, the Regional Director shall, in his Report, include a finding and determination as to whether the employees in the Unit have selected one of the contesting labor organizations as their bargaining representative.

X. Run-Off Election

In the event the Regional Director, in his Report on Consent Election, finds that none of the choices offered on the ballot obtained a majority of the valid ballots cast, he shall in such Report rule as to whether under currently established practice and procedure of the Board a run-off election shall be held and, if so, as to the choices to be offered on the ballot therein. The Regional Director is [fol. 72] specifically empowered to direct and conduct such run-off and, if necessary, successive run-offs. The employees eligible to vote in the original election, exclusive of any who quit or were discharged for cause between the date of the original election and any run-off election, will be eligible to vote in such run off. Any run-off shall be in accordance with Sections I, II, III, V, VI, VIII, and IX of this Agreement except that the Report provided for in Section IX shall be entitled "Report on Run-Off Election."

XI. Approval

This Agreement is subject to the approval of the Regional Director.

Richwood Clothespin & Dish Workers Union (Petitioner); by B. E. Thompson, (Name of representative). United Construction Workers Organizing Committee, Local 129, C. I. O.; by George J. Titler (Name of representative). The Wallace Corporation (Employer); by M. B. Wallace, Jr. (Name of representative).

Recommended: Harold D. Estor, Field Examiner. National Labor Relations Board.

Approved Jan. 19 1942. Philip G. Phillips, Regional Director. National Labor Relations Board.

[fol. 73] RESPONDENT WALLACE CORPORATION'S EXHIBIT 4

United States of America

Before the National Labor Relations Board

Ninth Region

Case No. IX-R-658

In the Matter of The Wallace Corporation and Richwood Clothespin and Dish Workers Union

Report on Consent Election

Pursuant to the Agreement for Consent Election entered into by the parties in the above-entitled case, the undersigned reports that an election by secret ballot has been conducted with the results set forth below:

Total on eligibility list	207
Total ballots cast	186
Total ballots challenged	0
Total blank ballots	0
Total void ballots	0
Total valid votes counted	186
Votes cast for Richwood Clothespin & Dish Workers Union	98
Votes cast for United Construction Workers Organizing Committee	83
Votes cast for (neither)	5

No Objections to the conduct of the election or to a determination of representatives based on the results thereof have been filed within the prescribed period.

[fol. 74] The undersigned, therefore, pursuant to Section IX of the Agreement for Consent Election finds and determines that Richwood Clothespin and Dish Workers Union (has) been designated and selected by a majority of the employees in the agreed unit, as the exclusive bargaining representative of the employees within the unit.

Philip G. Phillips, Regional Director. National Labor Relations Board.

Dated at Cincinnati, Ohio this fourth day of February, 1942.

[fol. 75] RESPONDENT WALLACE CORPORATION'S EXHIBIT 5

Contract of Agreement

This contract of agreement made on the 7th day of March 1942 between the Wallace Corporation, a corporation hereinafter referred to as the "Company" and the Richwood Clothespin and Dish Workers Union and its negotiating committee, Lundy Groves, Ancel Smith and Kathleen Conley, a corporation hereinafter referred to as the "Union", hereby mutually agree that the following working conditions shall prevail in the plant of said Company at Richwood, West Virginia during the period that this contract shall remain valid and in effect.

Article I

(A) Any clause included herein which may be contrary to any statutory law now in effect or to any new statutory law that may become effective during the valid period of this contract shall be considered as null and void.

(B) The Company recognizes the Richwood Clothespin and Dish Workers Union as the sole collective bargaining agency for all eligible employees in the Company's plant at Richwood, West, Virginia.

(C) This contract shall become effective immediately and shall remain in effect until two years from this date or until the 7th day of March 1944 and from year to year thereafter; subject, however, to the right of either the Company or the Union to terminate this agreement at the expiration of the two year period or at the expiration of any subsequent yearly period by written notice of intention to so terminate this agreement given to the other party at least thirty (30) days prior to the expiration date selected. The wage and rate clauses herein, however, shall [fol. 76] be held subject to renewed discussion and adjustment if mutually agreed upon at the end of each period of twelve months during the validity of this contract.

(D) The Company reserves the right to hire any person as an employee or to discharge or suspend any employee for proper and just cause.

(E) The Company agrees that all of its employees, other than office personnel, superintendents, managers, foremen,

watchmen and any others assigned to supervisory duties, shall be members of the Union in good standing. With respect to present employees of the Company not now members of the Union and likewise with respect to any person hereafter hired by the Company, other than those above expressly excepted, all such persons shall become members of the Union within 10 days from the date of this agreement, as to present employees, or within ten (10) days from the date of employment with respect to future employees, and the Company, upon request of a duly authorized officer of the Union, designated for the purpose, shall require identification of any employee as a member of the Union and proof of good standing. It is mutually agreed by both parties hereto that should the Union at any time become affiliated in any way with any labor organization or federation having membership or local union affiliations in more than one town outside of the City of Richwood, West Virginia, this clause (E) of Article I shall immediately become null and void, without however, affecting in any way the other clauses of this contract.

(F) There shall be no discrimination, interference, restraint or coercion by the Company or any of its agents against any employee because of membership in any Union. The Union agrees not to coerce or intimidate any employee into membership, and also, not to solicit or permit solicitation of members on the Company's time.

[fol. 77] (G) The Union agrees that during the term of this agreement there shall be no strikes, slow ups, sit downs, sympathy strikes, stoppage of work or any other form of interference with production or other operations, and the Company agrees there shall be no lockout. Any employee or group of employees violating this provision shall be immediately discharged by the Company and such discharge shall not constitute a grievance.

Article II

(A) Members who have worked for the Company for the longest period of time shall except as hereafter provided, be given preference of employment in their particular line of work or department in case of lay-offs, during periods of limited or curtailed operation. This does not mean, however, that employees in one line of work or

department shall hold seniority over employees in another line of work or department.

(B) Sawyers, filers, inspectors and other members whose judgment is the determining factor in the quality of products or efficiency of operation shall not be subject to the said seniority rules. The judgment of the management shall be final as to the retention of such members during said periods of limited or curtailed operation.

(C) A "Seniority Committee" of the three members shall be oppointed. Two members of said committee shall be appointed by the Union and one member by the Company. A set of seniority rules and regulations by which all seniority cases shall be governed shall be drafted by said committee. The joint approval of the Union and the Company shall be obtained of said seniority rules and regulations. Subsequently, all seniority cases shall be heard and ruled upon by said committee according to the provisions [fol. 78] of said seniority rules and regulations. The judgement of said committee in said seniority cases shall be final and members shall be governed in said seniority cases accordingly.

(D) At its own expense the Company shall provide and properly maintain within the plant for the use of the Union and its members and all employees of the Company, adequate, satisfactory and sanitary toilets and coat and locker rooms. Facilities for the use of women shall be properly separated from those for use of men employees. An adequate number of sanitary drinking water fountains shall also be provided and properly maintained within the plant at the expense of the Company. Any facilities mentioned above now needed in addition to those already installed in the plant, will be provided and installed as quickly as possible subject to the Company's ability to secure needed material from the suppliers thereof.

Article III

(A) The Company shall permit no members of the Union employed on a piece work basis to start direct production or actual operation of machines daily before the morning and noon work whistles have been blown nor to continue direct production or actual operation of machines after the noon and evening quitting whistles have been blown.

(B) Any and all overtime required in a department shall be given to members regularly employed on the actual job or in the department involved unless such members are not available for the overtime work.

(C) Any member required by the Company to work overtime shall be paid for such overtime work at an "overtime rate" equal to one and one half times the regular [fol. 79] time rate or piece rate regularly paid said member required to work overtime. It is understood that "overtime" shall be any time worked in excess of forty hours (40) in any one week.

(D) Any new and inexperienced Union member employed by the Company and assigned to piece work duties shall be paid not less than the basic wage scale required by law. If and when said new employee earns in excess of the minimum on a piece work basis, the higher rate shall be paid.

Article IV

(A) At any time the regular job of a member is temporarily not required for any reason and said member shall voluntarily accept temporary employment which carries a different rate of pay, said member shall receive the rate of pay regularly allowed by the Company for the work that said member is temporarily assigned to. Said employee shall have the privilege of laying off, however, provided the compensation for said temporary employment is not satisfactory to said member.

(B) Should any differences arise between the Company and the Union and its members as to the meaning and application of the conditions and provisions of this contract, or should any differences arise between the Company and the Union and its members over matters not specifically mentioned in this contract, or in the event of failure of the parties to agree upon wages and rates pursuant to negotiations referred to in Article I (C) or Article (B) hereof, there shall be no suspension of operation nor employment by either the Company or the Union or members of the Union on account of such differences, which shall be immediately settled according to the following pro- [fol. 80] cedure. First: Between the aggrieved member and his or her foreman if possible. Next: Through the

efforts of the management and the proper committee representatives of the Union. Next: Through the efforts of a special committee composed of three neutral persons one of whom shall be appointed by the Union, one by the Company and the third committeeman to be selected by the other two appointees. The decisions of said committee of arbitration shall be respected as final by all parties concerned.

Article V

(A) From the effective date of this agreement all hourly and piece rates then currently paid to eligible employees shall be increased 5 (five) per cent. This 5% increase shall be made retroactive to January 13th, 1942. The Company shall pay within thirty (30) days from the effective date of this agreement, the respective amount of back pay due to all employees who were employed during the period and who are still employed on the effective date of this agreement.

(B) For the purpose of determining whether any additional changes should be made in the Company's hourly and piece rates in each department, after giving effect to the increase noted above, a committee shall be appointed consisting of representatives selected by the Company and representatives selected by the Union. It shall be the duty of this committee to study and analyze all rates and to reach agreement thereon, should the committee be unable to agree then the questions in disagreemnt shall be submitted to arbitration as provided for in clause (B) of Article IV.

[fol. 81] As evidence of their understanding and agreement with the foregoing, the parties hereunto affix their signatures and seals.

The Richwood Clothespin and Dish Workers Union; Carm Reese, President; Zela Smith, Secretary. The Wallace Corporation M. B. Wallace, Jr. President; H. L. Bartley, Secretary. (Seal.)

Addendum

The three corrections: "It is mutually agreed by both parties hereto"—"in more than one town"—"of mem-

bers" were made before this contract was signed and are hereby accepted and agreed to by both parties hereto.

The Richwood Clothespin and Dish Workers Union; Carm Reese, President; Zela Smith, Secretary; The Wallace Corporation M. B. Wallace, Jr. President; H. L. Bartley, Secretary.

[fols. 1-46] BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. IX-C-1601

In the matter of THE WALLACE CORPORATION and B. E. Thompson and Local Union No. 129, United Construction Workers' Organizing Committee.

Main Court Room, Nicholas County Court House, Summerville, West Virginia, Thursday, July 9, 1942.

The above-entitled matter came on for hearing at 10:00 o'clock a. m., Eastern War Time, pursuant to notice.

Before William E. Spencer, Trial Examiner

APPEARANCES:

Thomas E. Shroyer for the Board.

Lewis Rice Tucker, Allen & Chubb, 208 North Broadway, St. Louis, Missouri, by R. Walston Chubb, for The Wallace Corporation.

Wolverton & Callaghan, Richmond, West Virginia, by Brooks B. Callaghan, for The Wallace Corporation.

Ritchie, Hill & Thomas, Security Bank Building, Charleston, West Virginia, by Chas. Ritchie, for Respondent B. E. Thompson, Richwood, West Virginia; and for Intervenor Richwood Clothespin & Dish Workers' Union, a Corporation, Richwood, West Virginia.

[fols. 47-55] DENIAL OF MOTIONS TO DISMISS

Whether or not those allegations are going to be supported, I do not know, but I do think that the Board has stated a prima facie case and since that is true, in my opinion I would not be justified in dismissing the complaint at this point, and I am going to deny each of these motions

to dismiss, meaning the motion offered on behalf of the Respondent Wallace Corporation, the Independent and the Respondent Thompson.

[fol. 56] STIPULATION AS TO CERTAIN FACTS

Mr. Shroyer: With reference to the jurisdiction, I believe that all of the parties will enter into a stipulation which I will now read:

"Counsel for all of the parties in this proceeding agree and stipulate that the Respondent, The Wallace Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, and with its principal office in St. Louis, Missouri;

"That it maintains plants in Richwood, West Virginia, in Wausau, Wisconsin;

"That at its Richwood, West Virginia, plant its chief business is the manufacture, sale and distribution of clothespins, and paper food trays;

"That at its plant at Richwood, West Virginia, with which we are here concerned, the principal raw material is wood, approximately all of which comes from the State of West Virginia;

"That during the past year the raw materials purchased exceeded $100,000 in value;

[fols. 57-61] "That during the last year the gross sales at the Richwood plant exceeded $200,000 in value, and that over 75 per cent of such sales were made and distributed outside the State of West Virginia; and

"That the Respondent The Wallace Corporation, employs on an average of 200 employes at its Richwood plant.

"And it is further stipulated and agreed that the National Labor Relations Board has jurisdiction in this case from the commerce standpoint."

Trial Examiner Spencer: You have heard the stipulation, gentlemen. Is it agreeable to all the parties?

Mr. Chubb: Saving my exceptions throughout to the introduction of testimony at this time in this case as to the ruling of the Examiner.

Trial Examiner Spencer: Oh, yes. I simply want to know if you agree to the facts as stated.

Mr. Chubb: The facts stated are correct, and I stipulate to those facts.

Mr. Ritchie: Counsel for B. E. Thompson and the intervener so stipulate with a like reservation as made by the Respondent Wallace.

[fol. 62] COLLOQUY RE PRE-TRIAL SETTLEMENT.

Mr. Chubb: I suggest at this point in the proceeding that it seems to me that there is a possibility that the attorney for the Independent and the attorney for the Board might profitably concur with the idea of seeing if there is any possibility of a settlement of the problem, the principal problem here, of the return of these people to work, and then to consult with their respective principals, Mr. Shroyer with the Board, and Mr. Ritchie with his people, and get such authority as might be necessary to make such a proposal [fol. 63] and submit it here.

I suggest that in the interest of possibly a disposing of this matter, and with the assurance which I made before and now repeat, that the company is ready to take any steps which are necessary to the end that these people be put back to work, as it has been throughout, since this agreement was entered into.

Trial Examiner Spencer: I am very glad that there is a suggestion, Mr. Chubb. Mr. Ritchie, I would like to have your response to Mr. Chubb's suggestion.

Mr. Ritchie: I feel that Mr. Chubb's suggestion has been made in perfectly good faith, that it is certainly worthy of serious consideration. Of course, I could not at this time give any assurance of the possibility of working this thing out by way of compromise, but I assure you of my most earnest cooperation in trying to do it if it is possible to do so.

I fully realize the seriousness of thirty or forty people being out of work, and I also realize the seriousness of a long drawn out hearing in this case, which, as I indicated in a previous statement, would stir up again bitter feelings which have, to some extent, become latent, and I will try to get in touch with the people that I represent, that is, the members of the Independent, tonight, and discuss the possibility of working out some settlement, if such a thing is feasible or possible.

[fols. 64-65] Mr. Shroyer: I will say for the Board that I am in hearty agreement and sincerely hope that we can come to an agreement, and I would like to express to the

representative of the company my thanks for the suggestion.

[fol. 66] Proceedings

Trial Examiner Spencer: The hearing is in order.

Mr. Ritchie: Mr. Trial Examiner, pursuant to our adjournment of yesterday, I went to the Town of Richwood and arranged for a meeting of the Richwood Clothespin & Dish Workers' Union, which meeting was held last night. The meeting continued until about 11:00 o'clock at night. I took up with them the proposition that was discussed yesterday morning and the matter was discussed pro and con and, at my suggestion and recommendation, I think I can report that the members of that organization would be willing to go along the lines that were suggested yesterday with reference to the compromise.

However, at the meeting—after the meeting, I met Mr. Shroyer in the hotel lobby, and he advised me that he had talked to Mr. Phillips——

Mr. Shroyer: Just a minute. I do not see any place for any of this discussion on the record. After all, it is with reference to a settlement that was not arrived at.

Mr. Ritchie: I did not realize there was any secrecy about it, the thing came up first at the suggestion of the Trial Examiner. We took up the negotiations.

Trial Examiner Spencer: Well, that is quite true; of course, the negotiations went on outside of this hearing. They were informal and naturally will not have any effect [fol. 67] on the actual hearing. It was my hope that the parties might reach a settlement, and I did want to have a report on whether a settlement was reached or not.

Mr. Ritchie: And I was trying to make a report of what actually happened.

Trial Examiner Spencer: I see no objection to your making the report, briefly stating whether or not you were able to reach an agreement.

Mr. Ritchie: And I do not know I can explain my position without explaining what happened, between Mr. Shroyer and myself.

Trial Examiner Spencer: Well, all that I am interested in, Mr. Ritchie, is whether or not you reached an agreement.

Mr. Ritchie: I am in a position to report that we could reach an agreement along the lines that we discussed yesterday morning.

Mr. Shroyer: I am willing to let the record show that Mr. Ritchie made me a proposition which I was unable to accept and that I made him one which he was unable to accept.

[fol. 68] COLLOQUY RE STIPULATION

Mr. Shroyer: Yes, Mr. Examiner. However, before we start, this morning, in Paragraph 11 of the Board's complaint it is alleged that Respondent The Wallace Corporation discharged and refused to reinstate the following [fol. 69] named employes because they were members of the United and because they were not members of the Independent, and then there are 43 names listed.

In the answer of the Respondent Wallace, in Paragraph 11, I find respondent states that "Most of the said named employes became ineligible for employment by respondent on or about March 18, 1942, and were laid off by respondent Wallace Corporation under the requirements of an agreement entered into with the Richwood Clothespin and Dish Workers' Union on or about March 7, 1942, wherein it was provided that all employes of the respondent at its Richwood plant must be members of the Richwood Clothespin & Dish Workers' Union."

What I am getting at is to save time I would like to dispense with the necessity of calling all 43 of these people if it is possible and agreeable to all as to any stipulation as to the facts concerning them. I talked to Mr. Ritchie last night and he thought it would be.

Mr. Ritchie: I do not think that there is any controversy about the facts concerning them. I do not see any reason why we could not stipulate.

Trial Examiner Spencer: Well, now, if you can get a stipulation it will certainly shorten the record.

Mr. Shroyer: May we go off the record?

Trial Examiner Spencer: Yes. We will take a ten min-
[fol. 70] ute recess.

(A short recess was taken.)

Trial Examiner Spencer: On the record.

Mr. Ritchie: It is stipulated by and between the parties to this proceeding that 43 employes of The Wallace Corporation at its Richwood plant were laid off from their employment on or about the 18th day of March, 1942, pursuant to the terms of the contract between The Wallace Corporation and the Richwood Clothespin & Dish Workers' Union as bargaining agency for said Wallace Company's employes, which required the company to recognize as employes only those who were members of the said Richwood Clothespin & Dish Workers' Union; that (naming them) being 12 in number, did not apply for membership in said organization; that (naming them) 31 in number, did apply for membership in said organization and their applications were voted upon in the regular manner prescribed by the organization, but that such applicants did not receive the number of votes necessary to enable them to become members thereof.

Trial Examiner Spencer: Counsel, you have thus far simply stipulated that 43 named employes——

Mr. Ritchie: We expect to name them.

Trial Examiner Spencer: Would you like to have the proposed stipulation read, Mr. Shroyer?

Mr. Shroyer: Yes.

[fol. 71] (Proposed stipulation read.)

Mr. Shroyer: Mr. Examiner, at the present moment——

Trial Examiner Spencer: Do you want this on the record?

Mr. Shroyer: Yes.

Trial Examiner Spencer: Very well.

Mr. Shroyer: At the present moment I am unable to agree in the stipulation. However, I feel that there is a possibility, a strong possibility, that if we leave the stipulation stand for the time being that we can all agree to it some time during the day. For that reason I would ask that it remain in the record but not as a stipulation.

Mr. Chubb: I would like to make it clear that the stipulation was suggested and requested by counsel for the Board.

Trial Examiner Spencer: That is plain on the record.

Mr. Chubb: That in so far as Wallace Corporation is concerned, we have no objection to the stipulation, but that if it is entered it is subject to our exceptions to the introduction

of testimony of any kind at this point in the case in chief or on the merits.

Mr. Ritchie: Counsel for the Independent and for B. E. Thompson, respondent, would like to have the same reservation.

Trial Examiner Spencer: Very well.

[fols. 72-73] William D. Griffie.

. . . . . .

[fols. 74-75] Direct examination.

By Mr. Shroyer:

Q. And where do you live, Mr. Griffie?

A. Richwood.

Q. And what is your business or occupation?

A. Well, I have been employed at the Wallace Corporation for the last 12 years.

. . . . . .

[fol. 76] By Mr. Shroyer:

Q. From whom did you receive your orders?

A. Mr. White.

Q. What is his full name?

A. Harry White.

Q. And do you know what was his job there?

A. He is the mill foreman.

Q. And is this filing room in the mill?

A. Yes, sir, it is all combined.

Q. Is there anything else in the mill other than the filing room?

A. Not in the filing room, it is all the filing room.

Q. Now, in the mill, other than the filing room?

A. Oh, yes.

Q. What else is there?

A. Band mill, circle saws, practically all of the material goes through this mill room that goes to the plant, all over [fol. 77] the plant.

Q. Are you a member of any labor organization?

A. Yes, sir.

Q. What one?

A. The United Construction Workers.

Q. And when did you become a member of that organization?

A. The 18th day of August, the eighth month, 10th day, 1941.

Q. August 10, 1941, is that right?

A. That is right.

Q. And was that at the beginning of the organization of this union at the Wallace plant?

A. Yes, sir.

Q. Where did you become a member?

A. I became a member on the school grounds over at Richwood High School.

Q. What was going on there at the time?

A. There were an open meeting over there that day, on the afternoon.

Q. An open meeting of what?

A. What—this was United Construction Workers had an open meeting for the public, for the paper company, from Cherry River Boom and Lumber Company, and The Wallace Corporation, all of them were invited.

. . . . . .

[fol. 78] Q. Were there any of your supervisors present at that meeting?

A. Well, there was, they wasn't right on the grounds, but I seen a couple of them on the street right in front of the building, and outside of Mrs. Weese, she were on the ground, she were right in front of the building all of the time, right in front of the building.

Q. Mrs. Weese?

A. Yes, sir.

Q. And who is Mrs. Weese?

A. She is in the office, works in the office.

Q. Do you know anything more of your own knowledge as to the nature of her duties?

. . . . . .

The Witness: Well, I know that I have taken orders from her.

By Mr. Shroyer:

Q. In what respect?

A. In the mill room when I were running the mill room [fol. 79] I got orders from her, different times.

Q. You say when you were in the mill room. What do you mean by that?

A. Well, I mean that I was foreman in the mill room for a period of from between two and three years.

Q. And when was that?

A. That was during 1935 and 1936 and '37.

Q. And during that period, was it during that period that you received orders from Miss Weese?

A. Yes, sir.

Q. What was the nature of those orders?

A. Well, like different times, now like we would be running one day short on the week, and she would come around and give us orders to run an extra day, or if she wanted to change from one pin to another, or make more of one stock than another, she would come around and give the orders what she wanted or else would send and call me over there and tell me at the office.

Q. Call you over to the office?

A. Yes, sir.

Q. Would those times be in the presence or absence of Mr. Davis?

A. Yes, sir.

Q. Which?

A. Be in the absence of Mr. Davis.

[fol. 80] Q. And who is Mr. Davis?

A. Who is he?

Q. Yes.

A. He is just Mr. Davis.

Q. Do you know what his capacity or job is at The Wallace Corporation?

A. He is supposed to be the superintendent of the plant, the general manager.

Q. Who signed your pay checks at The Wallace Corporation?

A. Miss Weese.

. . . . . .

[fol. 81] By Mr. Shroyer:

Q. You signed a card at this meeting, did you?

A. Yes, sir.

Q. And after that meeting, what, if any, was the progress [fol. 82] of the organization in the plant to your knowledge?

A. Well, the next morning after the meeting, Mr. White

came into the filing room and just went around over me like that (illustrating), and asked me where my badge was.

Mr. Shroyer: The witness indicated going over his chest with his hands.

The Witness: Well, that is the way he did, like he was feeling for my badge, and I told him they didn't give me one. He asked me if I was ashamed to wear it, and I says no, they didn't give me one, and I said, "I have a card, do you want to see that?" And he says, "No, I know you got it," he says, "you don't need to show it to me."

By Mr. Shroyer:

Q. Was that all of that conversation?

A. Well, we talked on a little bit, and he said it should never do me no good there, he said, the CIO would never operate in that plant.

Q. This Mr. White that you have reference to is Harry White?

A. Harry White.

Q. Were you ever elected to any office of the United Construction Workers?

A. Yes, sir.

Q. What office?

A. President.

Q. And when were you elected to that office?

[fol. 83] A. Well, I were elected February.

Q. Of this year?

A. Yes, sir.

Trial Examiner Spencer: Do you mean by that that you were elected president of the local?

A. Local 129.

By Mr. Shroyer:

Q. Had there been any previous president of the organization?

A. Yes, sir, temporary.

Q. Do you know who that was?

A. Mr. Gilbert Dean.

Q. Did you have any further conversations with Mr. White with reference to your union?

A. Well, yes, we had a lot of conversations along the same line.

Q. And when did these take place?

A. Well, the biggest ones I suppose we had were on the—we had one conversation after we asked for recognition with the company, we had a meeting.

Q. Just one moment. When did you ask recognition of the company?

A. On the first of September.

Q. Of 1941?

A. Yes, sir.

Q. All right, go on.

[fol. 84] A. He came—he were over at a meeting at the office, and he came back through and stood in there and talked to me concerning this, and he said he was just over there and said that Mr. Davis had just come in from St. Louis, and that Mr. Wallace told them, if he told them one time he told them twenty times, they would never operate under the CIO.

. . . . . .

By Mr. Shroyer:

Q. Now, there was a strike called at The Wallace Company plant by the United Construction Workers?

A. Yes.

Q. And when was that called?

A. The 25th of September, I believe. I am not real sure.

Q. And you went out on strike?

A. Yes, sir.

Q. You are familiar that there is also another union [fol. 85] presently in existence at The Wallace Corporation plant which we are calling the Independent?

A. I am now, yes.

Q. When did you first learn of the fact that that union had come into existence?

A. Something like two weeks after the strike.

Q. And how was it brought to your attention?

A. Well, the first I knew about it, me and a fellow by the name of Bill Armstrong was standing over on the corner of the Richwood Bank and Trust Company, and Mr. Gibson came up the street on the other——

Q. Who is Mr. Gibson?

A. Mr. Clark Gibson, the foreman of the lathe room department. He came up on the other corner and just a little

bit after he got there there were Mrs. Hank Smith and Mr. Hank Smith, they come up.

Q. Who are Mrs. Hank Smith and Mr. Hank Smith? With reference to the Wallace Corporation?

A. They are employes of The Wallace Corporation. Soon after they came up Mrs. George Tyree and Mr. George Tyree——

Q. Are they also employes of The Wallace Corporation?

A. Yes, sir, and there was quite a lot congregated there, and I would say there was between nine and eleven of them gathered on that corner there, and they had quite a little [fol. 86] conversation there, and then they went across Oakwood Avenue and me and Mr. Armstrong just walked along behind them and we followed them over to the end of the bridge across Cherry River and watched them depart into Lundy Grove's house.

Q. Is Lundy Grove also an employe of The Wallace Corporation?

A. Yes, sir.

Q. All right, go on.

A. Soon after they went in there they were a car drove up, somebody came out and turned the light on on the porch; this car stopped and a man that I didn't recognize got out of the car and went up and went in this house. Just as soon as he went up on the porch they turned the light out.

Q. Well, was there anything further that night? What did you do then?

A. No, I went back to the picket line after I saw. I stayed there a little bit.

. . . . . .

[fol. 87] By Mr. Shroyer:

Q. Were you ever asked to join the Independent union?

A. Yes, sir.

Q. By whom?

A. By Mr. Grove.

Q. When?

A. Well, it were during the strike. I wouldn't just say what time during the strike, because I don't remember.

Q. Well, just what did he ask you then?

A. He was standing, him and Mr. Blankenship was standing at the corner of Kincaid's Garage, and I walked down there and they stopped and started talking to me. Mr. Grove

just reached his hand in his pocket and says, "I will be as good to you as you was to me," he said, "You asked me to join your union," he said, "now I will ask you to join mine," and then he went on and said that that was the only way we was ever agoing to get back to work up there, if we ever got this thing settled we would have to settle it in that way.

[fol. 88] Q. Do you know in what department Mr. Grove works?

A. He works in the lathe department.

Q. Where is that with reference to where you worked?

A. That is in the adjoining department, right next to our department.

* * * * * * *

By Mr. Shroyer:

Q. Do you know what Mr. Grove's duties are at the plant?

A. He is a lathe man.

Q. And in that capacity what does he do?

A. Well, he operates machines.

* * * * * * *

[fol. 89] By Mr. Shroyer:

Q. Well, do you know the duties and work that Lundy Grove performs?

A. Mr. Grove performs, he operates, in other words, from four to five lathes, and he has two employes on each machine at all times, which requires—let's see—about fifteen girls on a charge. That is, there is that many different ones works on those machines, and he also takes over the entire departments in the absence of Mr. Gibson. I have knowed him to run the department for more than three weeks at a time.

Q. How large is this department?

A. It employes somewheres around sixty some people, I guess, when they are running full capacity.

Q. Well, is Mr. Gibson frequently absent from that department?

A. Yes, sir, he is, quite often.

Q. For how long a period of time?

A. Well, I have knowed him to be absent for three weeks.

Q. Well, how frequently is he absent?

A. Well, he is absent every year for a period of from not less than two weeks, and then all during the year he is off

quite a bit; he is kind of sickly and he does not work. He loses quite a lot of time during the wintertime, too.

Q. And during those periods Mr. Groves acts in his absence?

[fols. 90-91] A. Yes, sir.

Q. Now, you, after the strike was over, went back to work?

A. Yes, sir.

Q. Did you go back to work in the same department?

A. Yes, sir.

Q. Do you know the date that the strike was over and you returned to work?

A. We returned on the morning of the 13th of January.

Q. 1942?

A. 1942.

. . . . . .

[fols. 92-108] Mr. Chubb: At this time I make the same objection to the introduction of evidence on the merits and object to the introduction of evidence as to events occurring prior to the time of the strike settlement. Now, I would like to make that as a general objection and have it stand and take an exception to your Honor's ruling as a matter of course without having to renew it from time to time. Is that agreeable?

Trial Examiner Spencer: That is quite all right, counsel, and I will overrule your objection and you will have your exception. That is, testimony of alleged acts occurring before the settlement agreement was entered into. I understand that is the line of inquiry to which you are objecting.

Mr. Chubb: That is right, and I need not renew that with every witness.

Trial Examiner Spencer: You need not; that is quite sufficient.

Mr. Chubbs: Thank you.

[fols. 109-112] Cross-examination.

. . . . . .

[fol. 113] Q. Now, this man Groves—you said he operates machines, didn't you?

A. That is right.

Q. Keeps those machines running, that is what you meant, didn't you?

A. That is right.

Q. Takes care of anything, any trouble?

[fol. 114] A. That is right.

Q. What kind of machines were they, lathes?

A. Lathes.

Q. Were they clothespin lathes?

A. Clothespins and toys.

Q. Clothespin and toy lathes?

A. Yes, sir.

Q. He takes care of them, any trouble with them?

A. Yes, sir.

Q. That is his principal business, isn't it?

A. Well, part of it, yes.

Q. What?

A. That is part of it, yes.

Q. Now, does he sit down there and feed those machines?

A. No, sir.

Q. His business is to keep those machines running, isn't it?

A. That is a part of it.

Q. Now, the girls are the operators of those machines, aren't they?

A. Yes, sir.

Q. The girls operate the machines and Mr. Groves does not operate them at all. He keeps the machines running.

A. That is what I said.

Q. He inspects those machines and keeps them in running [fol. 115] order, is that right?

A. That is right.

Q. And he spends most of his time keeping those machines in repair?

A. Well, while he is there, yes, sir.

Q. Well, he is there every day?

A. Yes, sir, most of the time.

Q. Isn't that his principal duty? You can answer that. You said that is one of them.

Trial Examiner Spencer: Read the question.

(Question read.)

By Mr. Chubb:

Q. Now, Mr. Gibson, that is, Clark Gibson, is the foreman in that department, is that right?

A. Yes, sir.

Q. You said he is away and Mr. Groves does the same work running the department as he did.

A. That is right.

Q. Well, now, when Mr. Gibson is away, who takes care of Mr. Groves' duties?

A. Well, they got men there to check the machines.

Q. Does Groves arrange to take care of the machines, too?

A. He absolutely doesn't.

Q. Doesn't he stay right on the job?

A. He don't stay on the job. I have seen him there three weeks at a time and he didn't operate a machine.

[fols. 116-118] Q. You mean he didn't repair a machine, take out the knives?

A. No, sir.

Q. He did not touch a machine all that three weeks?

A. Oh, he might have touched a machine.

Q. But he didn't do any repair work on them at all?

A. That is what I said he didn't.

Q. That is what you say?

A. That is what I say—he didn't repair any machines?

Q. During that time that you say Clark Gibson is off and Mr. Lundy Groves does not take care of the machines, what does he do, did you say?

A. He takes care of Mr. Gibson's work.

Q. What does he do, I say?

A. He takes care of the time cards and the packing and all of that. He has quite a big job in there, placing the girls and changing them around from one place to another, cellophane tables, hairpin tables; and they pack certain kinds of one thing for a while and then they change over and pack something else, and he is pretty busy.

. . . . . .

[fol. 119] By Mr. Ritchie:

Q. Mr. Griffies, referring to the so-called open meeting that was held on the school grounds, I believe you stated that that was a meeting at which everybody was invited, is that right?

A. Of the Cherry River Boom Company, Paper Company, and The Wallace Company, they were all invited.

Q. In other words, these organizational activities up there

were more or less combined between The Wallace Corpora-
[fols. 120-123] tion employes and the Cherry River Boom & Lumber Company employes, is that correct?

A. The same bunch was trying to organize both of them.

Q. The same bunch was trying to organize both of them?

A. Well, that is right, yes.

Q. And when this open meeting was called, it was expected that the general public, or at least a part of the general public, could be there as well as employes, isn't that true?

A. Well, they could be there; there wasn't nobody barred.

Q. Well, wasn't it expected that there would be people there other than the employes?

A. Well, I could not answer that; I don't know whether it was or not.

Q. Well, would not very term "open meeting" indicate that?

A. Well, I would not necessarily see why that people that wasn't employed would have been interested in it.

Q. Isn't it a fact that practically the whole community of Richwood was very much interested in this organization activity up there because it affected the only two industries of any size that were in operation?

A. They might have been interested later after that, but they didn't seem to be so much so at the time.

. . . . . .

[fol. 124] Q. You stated that you had been notified that it would do you no good to apply for membership in the Independent.

A. That is right.

Q. Who so notified you?

A. Mr. Snyder and Mr. Robinson.

Q. Who is Mr. Snyder?

A. He is a deck man in the saw room, Mr. John Snyder.

Q. Is he a member of the Independent organization?

A. Yes, sir.

Q. And what was the occasion for his so notifying you?

A. His reason for my being voted out was because I would not—because I were president of Local 129.

Q. Well, how did he happen to tell you that?

A. Told me that right in my face—there was other people there—that he knew that I was one that wouldn't get to go in.

Q. Well, did he just volunteer that information, or did you ask him about it?

A. No, they were talking, and it was a crowd there talking [fols. 125-137] about the ones signing up, and some people said, well, they heard they was going to lay for so-and-so, even though they did sign up, and Snyder, he told me and Harvey, Foxy Snyder,——

Q. Who is Foxy Snyder?

A. I just got through telling you that?

Q. He is a member of the organization, is he?

A. Yes, sir.

Q. But in spite of that you did make an application?

A. I did.

Q. And were rejected?

A. I was rejected.

Q. And you have no means of knowing the reason why you were rejected, do you?

A. Nothing more than what he told me.

Q. What?

A. He was one of the members.

. . . . . .

[fol. 138] Redirect examination.

By Mr. Shroyer:

Q. Mr. Griffies, you stated on direct examination that you were elected president of your union. I believe the fact is not clear as to about what time that was. Can you give us an approximate date on it?

A. It was either the latter part of March, or in April, I couldn't say just what time it was.

Q. Well, then, is that with reference——

Trial Examiner Spencer: What year was that?

The Witness: How is that?

Trial Examiner Spencer: What year?

The Witness: 1942.

Trial Examiner Spencer: 1942.

By Mr. Shroyer:

Q. Then, with reference to the National Labor Relations Board election, that is after the election?

A. Yes, sir.

Q. And that is also after your employment ceased with the [fols. 139-143] company?

A. No, it was before.

Q. About how long before?

A. Maybe three weeks, something like that, just a short time before.

Q. Did you hold any office or position in your union before that time?

A. I was on the negotiating committee, I was a shop steward, negotiating committee.

Q. And were you one of the committee members who had the conferences with the employer?

A. Yes, sir.

Trial Examiner Spencer: At what time did you become a shop steward, approximately?

The Witness: Well, it was along in the latter part of August, 1941.

. . . . . .

[fol. 144] Recross-examination.

By Mr. Chubb:

Q. You stated that you were a shop steward early in the fall of 1941.

A. That is right.

Q. And a member of the negotiating committee of the CIO union, is that right?

A. That is right.

Q. Did you know that in the fall of 1941, when a demand was made for recognition by your union, did you know that the corporation, The Wallace Corporation, was willing to have an election to determine who represented the majority of the plant?

A. Yes, sir.

Q. You knew that; you were told that, were you not?

A. I was told that by Mr. Davis.

Q. And you have every reason to believe that is true, haven't you?

A. Well, I just believe what the fact is really.

Q. Didn't Mr. Titler or Mr. Palmer tell you that?

A. No, sir.

Q. They didn't tell you that?

[fols. 145-151] A. No, sir.

Q. And did you discuss that question in your meetings of your negotiating committee?

A. We did before the strike.

Q. You did before the strike?

A. Yes, sir.

Q. And you decided that you would not have an election at that time?

A. The majority of the plant did.

Q. The majority of what?

A. The plant.

Q. The plant?

A. They voted whether they would have an election or whether they would not, and the majority voted not to have an election.

. . . . . .

[fol. 152] Q. Yes. Now, Mr. Griffies, you were very active in this union right from the beginning, weren't you?

A. I suppose I was.

Q. You were one of the leading people in your union.

A. I was one of the leading signers, if that is what you mean.

Q. What were your duties as a member of this negotiating committee?

A. What were my duties?

Q. Yes.

A. Why, my duty was to try to get together with the company.

Q. And did you have any duties to go out and get members for your union?

A. I did not.

[fol. 153] Q. How?

A. I did not.

Q. Did you get any members?

A. Why, certainly. I handed out cards, if that is what you mean.

Q. Well, you tried to get everybody in that you could, didn't you?

A. I never went around trying to solicit them, if that is what you mean.

Q. Well, this was a pretty hard battle here, wasn't it, between the members of your union and those of the Independent?

A. I don't think it was, because in less than a period of a week we had 165 members.

Q. You mean you had them signed on your cards?
A. That is right.
Q. Did they pay any dues to get in?
A. Didn't pay any dues to get in.
Q. Didn't pay any dues. Now, you did hand out cards and you did try to get members, didn't you?
A. Sure, I handed out cards.
Q. Sure, you did. Now, isn't it a fact that you handed out cards any place you could hand them out?
A. I handed them out any time they called for them.
Q. And you handed them out when you were working over there in the plant, didn't you?
[fols. 154-167] A. I did not. I never had cards in the plant, before the strike.
Q. Didn't you go around in the plant and talk to people about joining the union?
A. I did not.
Q. You did not solicit membership in the plant while you were at work?
A. I never went off my job at no time, and there were nobody in my department to solicit but one man.
Q. Now, do you want to tell the Board that you didn't solicit anybody to join the union right there on company property?
A. I did not. I solicited them, plenty of them, there at the noon hour.
Q. You did?
A. Handed out plenty of cards.
Q. And on company time?
A. It was not on company time.
Q. It was on company property?
A. Sure, it was on company property.

. . . . . .

[fol. 168] MRS. MABLE HINKLE.

Direct examination.

By Mr. Shroyer:

Q. Is it Mrs. Hinkle or Miss Hinkle?
A. Mrs. Mable Hinkle.

. . . . . .

[fol. 169] Q. When did you first start to work for The Wallace Corporation?

A. Over thirteen years ago.

Q. And when did your employment cease?

A. On March 17, 1942.

Q. And what was your job at The Wallace Corporation?

A. Well, I used to run a slotter on clothespins and my last work I worked on the toy machine.

Q. You were working on the toy machine at the time your employment ceased?

A. Yes, sir.

Q. And who was your foreman?

. . . . . .

[fol. 170] The Witness: One foreman was Clark Gibson and the one you know that attended the machines was Lundy Groves.

By Mr. Shroyer:

Q. Well?

A. He is the foreman of the whole department, clothespin department.

Q. Will you tell the Examiner just what orders you received from Groves and what orders you received from Gibson, just how it ran?

A. Mr. Gibson always told us different places to work like the job we was on if we wasn't working there, we would have to go to him and see what we were going to do.

. . . . . .

[fol. 171] Q. Well, what orders did you get from Groves?

A. Well, about our machines that we were working on. You see, he was machine tender, kept up our machine when anything went wrong we had to go to him about it.

Q. What would happen if your machine broke down?

A. Well, I would have to go to him to fix it.

Q. Did he ever transfer you from one department to another?

Mr. Chubbs: I think we are going into leading questions here, Mr. Examiner. I will have to object to that. I want to get this witness' testimony.

Trial Examiner Spencer: Objection susfained. I would like to have the witness tell what she knows of the job of

Mr. Gibson; just tell us what he did in your department, to your knowledge.

The Witness: Which?

Trial Examiner Spencer: That is Groves.

The Witness: Groves?

Trial Examiner Spencer: Yes.

The Witness: Well, I would say he was machine tender and when Clark Gibson was off he was assistant boss because he took Clark's place.

. . . . . .

[fol. 172] Trial Examiner Spencer: Just a minute. I do not understand the witness' answer to that question myself and I would like to have it answered. Your testimony was that when Gibson was absent that Groves was assistant.

The Witness: Yes, sir; when Clark Gibson was absent.

Trial Examiner Spencer: What did you mean by your answer?

The Witness: I mean when Clark Gibson was absent that we had to go to Lundy and ask him what we were to do.

Trial Examiner Spencer: Who was Lundy?

The Witness: Lundy Groves.

[fol. 173] By Mr. Shroyer:

Q. How long have you known Lundy Groves?

A. Oh, around seventeen years.

Q. Where does he live?

A. He lives right by the side of me.

Q. Next door to you?

A. Yes, sir.

Q. How close are your houses together?

A. Oh, I would say from six to eight feet, something like that.

Q. Both of them have front porches on?

A. Yes, sir; only right now we are staying at my brother's on the farm, he is away and we are keeping house for him.

Q. How long ago did you move down to your brother's?

A. How?

Q. How long ago did you move down to your brother's?

A. We went in May.

Q. Are you a member of any labor organization?

A. Am I *waht*?

Q. A member of any labor organization.
A. I am a member of the CIO.
Q. And when did you join?
A. Last August.
Q. That is August of 1941?
A. Yes, sir.
[fol. 174] Q. And did you go out on strike on September 26th?
A. Yes, sir.
Q. 1941. Are you familiar with the union which was referred to as the Independent union?
A. Well, just what I have been told about it.
Q. When did you first hear about it?
A. Well, I would, I heard about it on the third day of October, 1941.
Q. That is after you went out on strike?
A. Yes, sir.
Q. And where did you hear about it?
A. At my home.
Q. Who did you hear about it from?
A. Verdie Groves.
Q. And who is Verdie Groves?
A. Lundy Groves' wife.
Q. Well, just how did it happen?
A. Well, she came out and—out on her front porch and we were on our front porch, I was on my front porch.
Q. Were you alone at the time?
A. No, my father, my mother and brother was there too.
Q. And what is your mother's name?
A. Rosa Tyree.
Q. Proceed.
A. How?
[fol. 175] Q. Go on.
A. And Ernest Tyree, my brother, was there also, and she said, "Mabel," she said, "We have got a union and we have got a union of our own now", and I said, "Yes, I heard about it."
Q. Now, where did you hear about it?

Mr. Ritchie: Just a minute. I don't believe that would be proper. It is hearsay, conversation with a person who hasn't any connection either with the company or with the Independent.

Mr. Shroyer: I think as long as we have identified—

Trial Examiner Spencer: Is Mrs. Groves, the person referred to, an employee of The Wallace Corporation?

The Witness: Yes, sir.

Trial Examiner Spencer: I will overrule the objection. You may proceed. Note the exception.

By Mr. Shroyer:

Q. You say that you said to Mrs. Groves that you knew it. What did you mean by that?

A. Well, I had heard of it before that they were and they had told me about they were going to have their meeting at Clark Gibson's.

Mr. Chubb: Well,——

Trial Examiner Spencer: Well, let the witness proceed and then if you feel disposed to at a later moment you may [fol. 176] offer a motion to strike.

By Mr. Shroyer:

Q. Well, Mrs. Hinkle, just tell us just what went on between you and Mrs. Groves this morning of November third, or was it October third?

A. Well, she said that they had a union of their own, and she said, "I called Irene Weese and asked her about organizing our union and Irene said it was all right for you all had as much a right to a union as the CIO", and she says we was going to have this meeting at Clark Gibson's; I believe, she said, they had told them to go to Clark Gibson's home, and then Clark said, "I can't have it at my house, there is too many CIO members, I will come up to the corner and send them over to your house", and then she said that when they got over there that there wasn't any of them knowed anything about organizing and she called Irene Weese at the City Hall, they were having council meeting, and asked her how to organize it and Irene said, "I can't tell you anything, but I will recommend Thompson to you."

Trial Examiner Spencer: Just a minute, who is Irene?

The Witness: Irene Weese.

Trial Examiner Spencer: That is the person that has been referred to as Miss Weese?

The Witness: Uh-huh.

[fol. 177] The Witness: And Thompson is editor of the Republican, he is their organizer. Irene said, "I will recommend Thompson to you for he is experienced in unions", and she said, "I told her I don't know Thompson", and she said, "I will send him over to you", and she said, "Turn the lights on on the front porch so he will know where to come to", and she said, "We are getting all of our information——"

Trial Examiner Spencer: Who said that? "I will turn my lights on on the front porch".

The Witness: At the Groves, where they were having the meeting that night.

By Mr. Shroyer:

Q. Did Mrs. Groves tell you when all this took place?
A. The night before.
Q. Had you been home the night before?
A. Yes, sir.
Q. Did you notice any meeting going on there?
A. Yes, sir, I did.
Q. Just tell us what you saw the night before.
A. Well, I saw, I counted 27 people that were up there, and she told me there was 37, but 27 was all I counted, but my hearing that they were going to have this meeting at Clark Gibson's, I knew what was going on when I saw all these people going up there, because I knew who be-
[fol. 178] longed to the CIO and who did not.

Trial Examiner Spencer: Did you have this conversation with Mrs. Groves before or after the meeting?

The Witness: After the meeting.

Trial Examiner Spencer: After the meeting.

The Witness: Yes, sir, they had the meeting on the second day of October and she told me this on the third day.

By Mr. Shroyer:

Q. That is, on the following morning?
A. Yes, sir.

Trial Examiner Spencer: Go ahead.

By Mr. Shroyer:

Q. Did you recognize any of the people that went into this meeting?

A. Yes, sir.

Q. Are you able to identify a few of them at this time?

A. Well, I can tell you who a lot of them was because I worked with them for years. One of them was my first cousin.

Q. Name a few of them.

A. George Tyree and his wife; Carm Reese and his wife, and Ancel Smith and his wife and I saw Ivy Keeler, I saw Dorcas Knight, Teresa Perkins.

Q. I think that is sufficient. Mrs. Hinkle, about what time in the morning was this that you had this conversation with Mrs. Groves?

A. I would say nine or ten o'clock, somewhere along there.

[fol. 179] Q. Do you frequently talk back and forth over the porch?

A. Yes, sir, we did then.

Q. And do you remember who started the conversation that morning?

A. She did, because I never, you know that I never did mention anything like that to her because we knew how she felt about us.

Q. What was her first word?

A. She told me that they had a union of their own.

* * * * * * *

[fols. 180-187] By Mr. Shroyer:

Q. Will you repeat, Mrs. Hinkle, just what Mrs. Groves told you with reference to Thompson.

A. She said she called Irene about organizing and Irene said, "I can't tell you anything, but I will recommend Thompson to you because he is experienced in unions", and Verdie said, "I don't know Thompson", and she said, "I will send him over to you".

Q. Did she say whether or not Thompson came over?

A. Yes.

Q. What did she say with reference to that?

A. She said when Thompson came that he asked Lundy if the CIO had a majority and Lundy said there was no doubt but what they did.

. . . . . .

[fol. 188] Cross-examination.

By Mr. Ritchie:

Q. Mrs. Hinkle, just when was it that Mrs. Groves as you say told you that they already had a union of their own?

A. Just when was it?

Q. Yes.

A. The third day of October, 1941.

Q. And when did she tell you that they were going to have a meeting at Clark Gibson's?

A. This morning, October the third. They were supposed to have this meeting they had at her house the night before at Clark Gibson's.

Q. Let's see if I understand what you mean there. You say that they had a meeting at her house the night before they were to have one at Clark Gibson's?

A. No, sir; they had the meeting at her house on October the second and that was the one that was supposed to have been held at Clark Gibson's. Clark Gibson's house was filled up and he told her she would have to have it over at her house.

Q. How do you know that Clark Gibson told her that they would have to have it at her house?

A. That is what she told me.

Q. What Mrs. Groves told you?

[fol. 189] A. Yes, sir.

Q. Do you know whether or not Clark Gibson was ever asked as to whether or not a meeting might be held at his house?

A. No, sir, I don't know.

Q. You know nothing about it?

A. No, sir.

Q. Did you ever hear that Clark Gibson had made the statement that he did not want to have anything to do with any kind of organization of any kind, or words to that effect; that they could not have any meeting at his house?

A. No, sir, I never heard it.

Q. And you never heard it. Mrs. Groves never told you anything of that kind?

A. No, she didn't tell me that.

Q. Now, did she tell you that Irene Groves told her that she, Irene Groves—I mean Irene Weese, had told Mr. Thompson to come over to her house?

A. She said that when she told Irene, Irene told her that she would suggest Thompson to them and she would send him over.

Q. She would send Thompson over?

A. Yes, sir, when Verdie told her that she didn't know Thompson.

Q. And the reason she gave was that Thompson was [fol. 190] familiar with union matters, or words to that effect, is that right?

A. Yes, sir.

Q. And did Mrs. Groves tell you that Thompson came to her house in response to a suggestion of Irene Weese?

A. He come to her house, yes, sir.

Q. Well, did she tell you he came there at Irene Weese's suggestion?

A. No, she didn't say that.

. . . . . .

[fols. 191-192] Q. And didn't she tell you that Irene Weese told her in effect that she could not give you the information about union matters; do you not deny that?

A. She said she did not tell me anything but she would recommend Thompson to me.

Q. Because Thompson was familiar with union matters?

A. Yes, sir.

Q. That she, Irene Weese, could not give them any information, isn't that right, isn't that about the substance of it?

A. Yes, sir, she said I can't tell you anything but I will recommend Thompson to you. That is what she said.

. . . . . .

[fols. 193-205] HEZZIE HOUSTON SHAVER.

. . . . . .

Direct examination.

By Mr. Shroyer:

Q. What is your business or occupation, Mr. Shaver?

A. Why, I am not doing anything at the present time. I was working for The Wallace Corporation.

Q. And how long did you work for The Wallace Corporation?

A. Well, to my best recollection, it was about sixteen years.

. . . . . .

[fol. 206] By Mr. Shroyer:

Q. Do you know Carm Reese?

A. Yes, sir.

Q. Where does he work?

A. Well, he files bandsaws for The Wallace Corporation there.

Q. What department is he in?

A. He is in the saw room department.

Q. Where is that with reference to where you work?

A. Well, he works up inside of the mill and I work on the outside.

Q. Have you ever worked inside the mill with him?

A. Well, not for some time I haven't because I have been down on the pond practically for the last three or four years.

[fols. 207-235] Q. Well, do you know of your own knowledge what Carm Reese' job is?

A. Well, he is at this time—he is filing bandsaws but he was night foreman.

Q. When was he night foreman?

A. After the election when the night shift started he was put on boiler and night foreman.

Q. And who else? Do you know who Carm Reese' boss was?

A. Harry White.

Q. Had Carm Reese any duties other than filing?

A. At the present time?

Q. At the present time.

A. Well, at that time he was a-working at night up until they had the election, I mean until we was laid off on the 17th day of March.

Q. Were you working nights, too?

A. No, sir; I worked daytime.

Q. Then you don't know what he did at night.

A. I don't know what all he done at night.

Q. Have you ever worked with Carm Reese?

A. No, sir.

. . . . . .

[fol. 236] FRANCES LOGAR.

. . . . . .

Direct examination.

. . . . . .

Q. And—Were you ever employed by The Wallace Company—Corporation?

A. Yes, sir; I worked there. It will be 10 years ago this month.

Q. You are not working there now.

[fol. 237] A. No.

Q. And when did your employment cease?

A. Well, I was laid off on the 17th day of March, the last day I worked.

Q. And while you were employed there what department did you work in?

A. In the pin factory, pin department.

Q. And just what did you do in the pin department?

A. Well, the last job I was on was wrapping clothespins in cellophane.

Q. And who was your boss at that time on that job?

A. Mr. Gibson.

Q. And how large is the pin department?

A. I couldn't exactly tell you how many girls were working there.

Q. Well, could you in round numbers? Was there 100 or 10?

A. I guess there is about 100.

Q. Do you know Lundy Groves?

A. Yes, sir.

Q. Did he work in that department?

A. Yes, sir.

Q. Do you know what he does?

A. He is lathe man, when Clark Gibson is working; and then he is assistant boss when Clark is off; he tells us girls what to do.

[fol. 238] Q. Well, what has he ever told you to do?

A. Well, when Clark was off and I was on I was passing spring tins then and he was called away for maybe a week and I wanted to ask Lundy, why, I would go to him, what I would do next, and he put me packing round tins then.

Q. Why did you go and ask him?

A. Well, Clark wasn't there and I knowed that he always took Clark's place when he wasn't there.

Q. How often was Clark usually absent from his department?

A. Well, he was pretty ill different times last winter and I just don't know how many times he was off.

Q. Well, was it more than once?

A. Oh, yes.

Q. And at the times he was off would it be for more than one day?

A. Well, I think he was off two or three days once; he had the flu, they said.

Q. Now, you were off work, of course, during the strike.

A. Yes, sir.

Q. During that time did your foreman or any of the foremen ask you to report back to work?

A. Yes, sir, Clark Gibson.

Q. Will you tell us the circumstances of that?

A. Clark Gibson came to the house; he didn't come in the house; he didn't come in to the house; he was on the [fol. 239] road right beside the fence and blowed the horn and mother went out to see who it was and he asked if I was there so I went out and Mr. Gibson said, "We had a meeting this morning and," he said, "I got orders to go around and ask all the girls to go back to work and," he

says, "if you don't report at 2 o'clock the plant will be closed and your name will be off the payroll."

. . . . . .

Cross-examination.

By Mr. Chubb:

Q. When was the last conversation to which you have just referred?

A. That was before we went to work. Is that what you mean?

Q. Yes. What month was it? Was the plant closed at the time?

A. Yes, sir.

Q. It was during the strike, then.

A. Yes; it was during the strike.

Q. He came around and said, "The plant is going to open at 2 o'clock and if you don't come back you are off the payroll"; is that what he said?

A. Yes, sir.

Q. That was Clark Gibson, your foreman.

A. Yes.

Q. Were you out on the street when he said that or did [fols. 240-253] he say that to your mother?

A. Mr. Clark—this is Clark Gibson—blowed the horn and asked my mother if I was at home and mother called me and I went out and talked to Clark.

Q. You went out and talked to Clark.

A. Yes, sir.

Q. Were you a member of the C. I. O.?

A. Yes, sir.

. . . . . .

[fol. 254] STIPULATION

Mr. Shroyer: It is hereby stipulated and agreed by all the parties herein by their respective counsel that 43 employees of The Wallace Corporation at its plant at Richwood, West Virginia, were laid off by The Wallace Corporation on or about March 17, 1942 and have not since been rehired by The Wallace Corporation, pursuant to the terms of a working agreement between the Richwood Clothespin & Dish Workers Union and The Wallace Corporation, which

working agreement is now in evidence as respondent Wallace's exhibit 5.

Of the said 43 employees 12, to-wit:

Harold Harris		Kelso Meadows
Eugene Moore		Kenneth Cruse
Bill Willison		Ray Tulver
Red Bashaw		Cecil Little
Ida Ruley		Mildred Ross
Juanita Cogar	and	Loy Coffman

[fol. 255] did not apply for membership in the said Richwood Clothespin & Dishworkers Union;

Of said 43 employees 31, to-wit:

W. D. Griffie	Harvey Dodrill
Carl Williams	Jack Prescott
Cicero Godfrey	Jimmie Harris
Carrie Griffie	Roxie Dodrill
Fannie Logar	Millie Logar
Mabel Hinkle	Glenna Hannah
Ida Berry	Grace Trimble
Lilly Mollhan	Myrtle Bennett
Gillie Lewis	Ellen Dean
Claudie Dean	Garnett Frame
Nellie Gurnes	Gay McClure
Hazel Williams	Pearl Stewart
Ada Lockhart	Ella Brown
Jannie Hopkins	Dorothy Nutter
Dalla Dotson	Mary Facemeyer

and Ora Dodrill

applied for membership in said Richwood Clothespin & Dish Workers Union and their applications were voted upon by the members of said organization in the regular manner as provided by the constitution and bylaws of said organization but said applications did not receive the require- number of votes to permit them to become members therein.

[fol. 256] Mr. Examiner, this morning Mr. Ritchie at my suggestion proposed a stipulation which at that time we were not able to agree to since the stipulation was in reference to the 43 employees named in the complaint; however, at this time we have agreed to a stipulation which I have just dictated to the Reporter.

Counsel for the Board enters into and agrees to the stipulation.

Mr. Chubb: Counsel for respondent Wallace enters into the stipulation on behalf of respondent The Wallace Corporation.

Mr. Ritchie: Counsel for respondent Thompson and for the intervener so stipulates.

. . . . . .

[fol. 257] B. E. THOMPSON.

. . . . . .

Direct examination.

By Mr. Shroyer:

Q. What is your business or occupation, Mr. Thompson?

A. I am a newspaper editor.

Q. Of what newspaper?

A. Nicholas Republican.

Q. And can you tell us the set-up of your office in Richwood, with reference to your personnel?

A. Do you mean the ownership of the paper? I am sorry, I do not quite understand your question.

Q. No, I mean, Mr. Thompson, I mean as to your editorial staff.

A. Oh; I am the editor and manager of the paper.

Q. I suppose you do print some press releases and things of that nature?

A. Oh, yes.

Q. All the local news is all written by you?

A. It is either written or edited by me. My daughter is [fol. 258] on the staff, what might be termed society editor, but without that title.

Q. How long have you been editor of this newspaper?

A. Since August, 1939.

Q. And then you are editor today?

A. That is right.

Q. And you were editor of that newspaper at the time the CIO started organizing the various plants in Richwood?

A. Right.

Q. Now, did you become associated with either of the unions existing at The Wallace Corporation plant?

A. I advised with the Independent Union.
Q. Is your title that of business manager?
A. It was; but is no more.

[fol. 259] By Mr. Shroyer:

Q. When did that cease to be your title?
A. I can't remember the date, but on the day preceding [fol. 260] the first conference that I attended in the office of Mr. Phillips in Cincinnati. I would have to refer to my file to give you the date.

Trial Examiner Spencer: Do you have the file with you, Mr. Thompson?

The Witness: I am sorry, I do not. I can bring it tomorrow. Excuse me, could I say this off the record? May I ask Mr. Ritchie a question, he probably can remember the date.

Mr. Chubb: Is that the date that I was down there?

The Witness: No, this is the time before you were there.

Trial Examiner Spencer: Well, at this time give the best of your recollection; then if counsel wishes to ask you again after you have your file tomorrow, why you can get the date clear.

By Mr. Shroyer:

Q. What is your present position with the Independent Union?
A. Only a friendly adviser.
Q. Do you meet with them at their meetings?
A. At their invitation, occasionally.
Q. And in your capacity as business manager, what were your duties?
A. I would say the general business representative of the organization.
Q. Well, what did you do for them?
A. Handled their business.
[fol. 261] Q. Well, what business did they have?
A. Such things as arranging for counsel; arranging the details of the counsellor's fees.
Q. You did those two things?
A. Yes.
Q. What else?

A. Handling their immediate correspondence.

Q. Are you saying then that you wrote their correspondence for them?

A. Either wrote or approved it.

Q. What else?

A. Well now, you have got me at some disadvantage. I do not remember all of the various details. The general business routine of the union, similar to the routine of a business agent of any other labor union.

Q. Do you know when the first meeting of the Independent Union was held?

A. I know when the meeting was held that has been referred to in testimony here over at the home of Mr. and Mrs. Lundy Grove.

Q. That was the first meeting, to your knowledge?

A. So far as I know.

Q. Were you present at that meeting?

A. I was.

Q. Were there any officers elected at that meeting?

[fol. 262] A. Not while I was there.

Q. Do you know when officers were elected?

A. I was told they were elected at that meeting.

Q. Do you know who the officers were?

A. According to my information, I do.

Q. Who are they?

A. What officers?

Q. Well, president, if they have one.

A. Crum Reese.

Trial Examiner Spencer: Well, are you inquiring as to the date of this meeting at Groves' house, or as to the present?

Mr. Shroyer: I might clarify that. I am asking you, has there been more than one set of officers in existence?

A. Not more than one general set of officers, but I know at least one that I remember of, has been replaced.

Q. Well, that is what we want to know; we want to know the present officers, and if anybody has replaced somebody else I want to know who they replaced.

A. One that I know of; the secretary.

Q. Who is the secretary now?

A. Mrs. Ansel Smith.

Q. Who was previously the secretary?

A. Madge Dotson.

Q. And is there a vice-president?

[fol. 263] A. There is.

Q. And what is his name?

A. In fact, I believe they have two; E. G. Robinson is one, and if my memory serves me at the moment, Lundy Groves is one. Just a moment; let me correct that there, George Tyree.

Q. Is there a treasurer?

A. The office of treasurer is combined with secretary.

Q. Are there any other officers than those I have named?

A. A board of directors.

Q. Are you familiar with the names of the board of directors?

A. I believe I am.

Q. Will you name them?

A. Carm Reese, Lundy Grove, George Tyres, Zella Smith; I am sorry I can't remember the other one.

Q. Is Lundy Groves a director?

A. According to my memory, he is; I would have to refer to my files to give you accurate information. May I say this, I am not trying to pass the buck. I am an editor who has to do with the juggling of names and figures and so on and I make no effort to commit them to memory.

. . . . . .

[fol. 264] By Mr. Shroyer:

Q. Were you present, Mr. Thompson, at the meeting of the Independent at which these 31 people were voted on?

A. I was.

Q. That is, after the election?

A. I was.

Q. In what capacity were you there then?

A. As business agent.

Q. Did you take any active part in that meeting?

A. I did not.

Q. Do you know why these 31 people were not admitted to membership?

A. My observation was, because they did not receive the necessary number of votes to justify it.

[fols. 265-271] Q. It was put to a vote?

A. It was.

* * * * * * *

[fol. 272] By Mr. Shroyer:

Q. Well, Mr. Thompson, before you became associated with the Independent at the Wallace plant, what previous experience had you had with labor unions?

A. Several years ago, when I was a member of two different unions.

Q. And what unions were they?

A. International Brotherhood of Electrical Workers, and International Union of Mill Men and Smelter Workers.

Q. And in what State was that?

[fol. 273] A. The State of Tennessee.

Q. Were you an officer in either one of those unions?

A. I was.

Q. Do you know whether or not there is also an Independent Union at the Cherry River Boom and Lumber Company, in Richwood?

A. I do.

Q. Do you have any association with it?

A. Yes.

Q. What is your association with it?

A. Friendly adviser; former business agent.

Q. Did you resign that office as business agent of that organization at about the same time you resigned from this one?

A. At the same time.

Q. Which independent union were you associated with first?

A. The Richwood Loggers and Lumbermen's Union.

Q. And this present union in the Wallace Company's plant second?

A. Yes.

* * * * * * *

Cross-examination.

By Mr. Chubb:

Q. Mr. Thompson, you testified that you ceased to be [fol. 274] business manager of the Richwood Clothespin

and Dish Workers Union at about the same time that you ceased to be business manager of the union of the Cherry River Boom and Lumber Company. I would like for you to state to the Board the circumstances under which you resigned, and the connection of that resignation, particularly with the National Labor Relations Board and its agents.

A. Shall I wait for questions to be asked?

Q. No; I want you to just make the statement, how did it happen that you resigned, and was there any connection between your resignation and the action of the National Labor Relations Board?

A. To begin with, I hope that you do nor criticize me if I can not remember dates, and I have tried to state here why I can't.

Q. Just approximately.

Trial Examiner Spencer: Just do the best you can, Mr. Thompson.

The Witness: Approximately two months ago, according to my memory, or between that and three, I should say, I was called into a conference in the office of my employer, the Woodyard Publications, at Spencer, West Virginia. Mr. McKay came into that conference——

Q. Is that the gentleman that is sitting here this afternoon?

[fol. 275] A. That is right. He identified himself with Mr. Woodyard as a representative of the National Labor Relations Board, and advised Mr. Woodyard that the Board was going to prefer unfair labor charges and company union domination charges against the Woodyard Publications unless the Woodyard Publications would agree to do certain things. He was asked what those certain things were, and was told, if my memory serves, that the Woodyard Publications were dominating the Richwood Clothespin and Dish Workers Union, that they had organized that union and that they had dictated the policies and the functions of it since.

Mr. Woodyard asked Mr. McKay to justify his statements and was referred to a certain section and certain article the identity of which I do not remember.

Mr. Shroyer: One moment. Before we go into this further I would like to interpose an objection that I think

all of this has reference to a settlement that was attempted to be reached among all of the parties in this case.

Mr. Ritchie: You brought it out.

Mr. Shroyer: I did not bring it out.

Trial Examiner Spencer: The question asked was for him to explain why he resigned.

Mr. Shroyer: I do not think then that the answer is responsive.

Trial Examiner Spencer: Are you giving your explana-
[fol. 276] tion of why you resigned?

The Witness: Yes, sir; I asked should I wait for questions and was told to state.

Trial Examiner Spencer: You go ahead and give your explanation.

The Witness: That according, as I said, to a certain section of a certain article, the identify of which I do not remember, the Woodyard Publications are employers, and that according to a certain section of a certain article, different from the other one, the folks working for the Wallace Corporation in Richwood, West Virginia are employees; both references he stated within the meaning of those sections in the so-called Wagner Act.

Mr. Woodyard then told him that while it is true that he did employ people, or was an employer of people, and while he concedes it was equally true that The Wallace Corporation employed people, that he, Mr. Woodyard, was having no trouble within his organization, and that he could see no connection between the two references made by Mr. McKay.

As I remember, Mr. McKay contended that the Wagner Act meant that Mr. Woodyard was an employer, regardless of whether he employed the people in question or not, and he cited one case of litigation on the Pacific Coast, the identity of which I do not remember, in support of his contentions, and by the same authority he contended that
[fol. 277] the folks at The Wallace Corporation were employees and that in the interpretation of the Wagner Act the employees in question did not have to be employees of the employer in question.

Then he told Mr. Woodyard that unless you cause to be admitted into membership in the Richwood Clothes Pin and Dish Workers Union a certain group of former employees of The Wallace Corporation who had previously

applied for membership in the said union and been denied the same, that the Labor Board would file charges of company domination and unfair labor practices.

Mr. Woodyard told him that he had no way——

Trial Examiner Spencer: Mr. Thompson, I do not want to interfere in any way with the giving of your testimony, but I can not feel here at this point that this is an explanation of why you resigned and that is the question that you are supposed to be answering here. I am not interested in the settlement negotiations which apparently reached no fruition.

Mr. Shroyer: Is the Examiner aware of the fact that at this time he is talking about a conference that failed?

Trial Examiner Spencer: I did not agree, and that is why I asked.

Mr. Shroyer: That is why I asked that it be stricken.

Trial Examiner Spencer: Let me finish. Would you get [fol. 278] right down to the point where you resigned and what occasioned your resignation?

The Witness: For this reason that Mr. Woodyard asked me to resign, and I did; although I have not give you the complete detail of the conversation.

Trial Examiner Spencer: Well, I will be glad to have the complete detail of why you resigned, but I do not think that it is necessary to have al the details of the conference.

The Witness: We in the newspaper game are so accustomed to telling the full details that we feel we are slighting the question unless we do that.

Trial Examiner Spencer: Well, perhaps counsel will take that up.

Mr. Ritchie: I believe that what Mr. Thompson is about to tell is relevant, in fact I am familiar with the facts.

By Mr. Chubb:

Q. Now, Mr. Thompson, did Mr. McKay suggest to Mr. Woodyard at this conference, at which you were present, that you should resign, did that suggestion have any connection with this union issue?

A. Not according to my memory.

Q. Did your employer give you any reasons for asking you to resign?

A. He did.

Q. What was the reason given?

[fol. 279] Mr. Shroyer: May I enter my objection to this entire line of questioning on the ground that it is nothing but the settlement of a prior charge?

Trial Examiner Spencer: I will overrule your objection to the question that is pending and ask the witness to answer.

Mr. Chubb: Read the question, please.

Trial Examiner Spencer: Frankly, I want to know why he resigned, I would be glad to find out.

The Witness: His reason was that he had no objection to my being a friend of the unions, but that he wanted me to have no official connection with them.

By Mr. Chubb:

Q. Did he tell you why he wanted you to have no official connection with them?

A. Because he thought there might come a time, he said, when it might interfere or handicap me in exercising the freedom of the press.

Q. How soon after this conference that you attended did he tell you that?

A. Perhaps a week.

Q. In the conversations which Mr. McKay had at the conference with Mr. Woodyard, at which you were present, you mentioned that Mr. McKay stated that unless Mr. Woodyard did certain things, charges would be filed; among the certain things that he suggested, did he suggest that you disassociate yourself from this Richwood Clothes Pin and [fol. 280] Dish Workers Union?

A. He did not suggest that I disassociate myself, no, sir. He suggested that Mr. Woodyard have me disassociated.

Q. From the union, you mean?

A. Not only from the union, but from Richwood as well.

Q. Do you mean to say that as a condition of the withholding of this charge that he asked Mr. Woodyard to discharge you from your job?

A. Either to discharge me or transfer me to some other location.

Q. That was in your presence?

A. It was.

Q. Do you want to modify that or qualify that in any way as a fair statement of the facts? I don't want to give you a wide-open go-ahead; but it seems to me an extraordi-

nary thing for a representative of the Labor Board to suggest?

Trial Examiner Spencer: Counsel, I am not going into the matter of this settlement conference on the basis of something that might be charged against the Publications; that is not charged in this hearing. I think that the witness has given his explanation of why he resigned from the organization.

Mr. Chubb: I have no desire to qualify the answer; I will let it stand then, gentlemen.

Trial Examiner Spencer: Well, if the witness wants to [fol. 281] qualify his answer, why all right. Do you want to qualify your answer?

The Witness: I said what happened up to that time, although the complete details of the conference have not been stated.

Trial Examiner Spencer: I am not going over the complete details of something that has nothing to do with this hearing, so I suggest that counsel proceed.

Mr. Chubb: I think that is all. Oh!

Q. Mr. Thompson, you are familiar, are you not, with the negotiations which took place between the Independent—we have been referring to the Richwood Clothes Pin and Dish Workers Union as the Independent; you understand that, do you not?

A. I do.

Q. Are you familiar with the negotiations between the Independent and The Wallace Corporation following the election at which the Independent was certified as the collective bargaining agent for the employees of the plant here in Richwood of The Wallace Corporation?

A. Only during the time that I was acting as their business agent.

Q. What was the attitude of The Wallace Corporation as expressed to you towards the clause which has been variously referred to here as a union shop clause and a closed [fol. 282] shop clause, in that working agreement that the union finally negotiated with The Wallace Corporation; what was Mr. Wallace's attitude toward that clause?

A. Mr. Wallace very vigorously opposed it.

Q. And is that true of the other representatives that you talked to in your negotiations of that matter?

A. Representative of whom?

Q. Of The Wallace Corporation?

A. It is.

Q. Did you insist upon a closed shop clause in that contract, as representing the union?

A. I did; not a closed—yes, a closed shop, but eventually modified it to a union shop.

Trial Examiner Spencer: May I ask on what negotiations was it that The Wallace Corporation vigorously opposed this closed shop clause? Was that in the settlement agreement, are those the negotiations you refer to?

The Witness: That was the series of conferences during which the working agreement was being negotiated between the indepenednt union and The Wallace Corporation.

Trial Examiner Spencer: That was following the election?

The Witness: That was following the election.

Trial Examiner Spencer: Pardon me?

Mr. Chubb: I think the record so shows.

Trial Examiner Spencer: I was not just clear as to which [fol. 283] conference he was referring to.

Mr. Chubb: Will you mark this please, for identification?

(The document referred to was marked Respondent Wallace's Exhibit 8 for identification.)

By Mr. Chubb:

Q. Mr. Thompson, I show you a two-page letter here which has been marked for identification "Respondent Wallace's Exhibit No. 8," and ask you if you can identify that?

A. Yes, I can identify this as a copy of an original that I am familiar with.

Mr. Chubb: Will you mark these too?

(The document referred to was marked Respondent Wallace's Exhibit 9 for identification.)

Mr. Chubb: I take it there is no objection to my offering a copy in evidence.

Q. Is that the original of the letter which you wrote?

A. It is the original.

Q. To The Wallace Corporation on or about February 28, the date of it?

A. Yes.

Q. Now, I will show you a copy of a letter that has been marked "Respondent Wallace's Exhibit No. 9, for identification," which is a letter of March 20, addressed to you and ask you if you can identify that?

[fol. 284] A. I do.

Q. What was that Exhibit No. 9 for identification, Mr. Thompson?

A. I beg pardon?

Q. Is that a letter that you received from Mr. Wallace?

A. Yes, I can identify that.

Q. About March 20th?

A. That is right.

Q. Mr. Thompson, the letter of Mr. Wallace of March 20, Exhibit 9, refers to the concern of Mr. Wallace, or rather about the failure to reemploy and continue in employment 30 or 40 regular employees. Did Mr. Wallace express that concern to you following the date of March 20, or prior to the date of March 20, or both?

A. He did; both before and after that date.

Q. You are convinced that Mr. Wallace, as president of The Wallace Corporation, was at all times that you can remember, sincerely anxious to see that those employees returned to work; is that a fair statement?

A. In my opinion, that has been one of his chief concerns.

Q. Isn't it the fact that you, at the suggestion of myself and The Wallace Corporation, journeyed down to Cincinnati, Ohio, and had a conference with Mr. Phillips' office to see if we could devise some way of returning those men and women to work?

[fol. 285] A. I attended such a conference in Cincinnati.

Q. Is it not true that your union—when I say "your union" I mean the Independent Union, has considered and had presented to it various proposals to take those people into the union, those 30 or 40 people that were excluded?

A. Yes.

Q. And they have consistently refused to take them back?

A. They have.

Q. I am excepting, of course, what happened last night, which, I take it as I make the statement, and I do not know whether Mr. Thompson knows anything about it or not.

A. Well, I will modify my answer, and say until last night, yes.

Mr. Chubb: I think, Mr. Trial Examiner, that this is all for the present, but I take it that I will not be precluded from further questions if they occur to me in the morning?

Trial Examiner Spencer: Counsel, I would like to have you finish your cross examination so that we may go from yours to Mr. Ritchie's when we convene tomorrow, if it is convenient. I ask that we finish with the Respondent Wallace while we are here.

By Mr. Chubb:

Q. What was Mr. Davis' attitude, Mr. Davis the local superintendent, toward this clause in this contract, this closed-shop clause or union shop, toward this clause in this contract which was negotiated with the Richwood Clothes-
[fols. 286-288] pin and Dish Workers Union?

A. Similar to that of Mr. Wallace.

Q. Did you have some harsh words with either or both of them about it?

A. Several times.

Mr. Chubb: I think that is all.

* * * * * * *

[fol. 289] Cross-examination—Continued.

By Mr. Chubb:

Q. Mr. Thompson, you referred, I believe, in your testimony to some experience with labor unions in the past. Is it not a fact that you helped to organize one of these unions?

A. It is.

Q. One of these unions which you mentioned as being connected with:

A. I did.

Q. And would you just state what union that was and the circumstances of the organization of that union?

A. That was at the plant of the Dixie Portland Cement Company in Richards City, Tennessee.

[fol. 290] Q. Were you employed there?

A. I was.

Q. In what capacity?

A. An electrician.

Q. And what International, if it was an International union, was it organized under?

A. Under the International Union of the Mill, Mine, and Smelter Workers.

Q. Were you successful in organizing a union there?

A. I was.

Q. Did it result in collective bargaining?

A. It did.

Q. Were there any strike troubles?

A. No, sir.

Q. Did you succeed in improving the conditions of the men employed in that plant?

A. Very materially.

Q. And did you personally have any trouble on account of your union activities?

A. Could I ask a question?

Q. Yes.

A. Do you mean violence, or what?

Q. No; I mean was there any antagonism shown to you by the employer?

A. Oh; I was fired, if that is what you mean.

[fols. 291-295] Q. You were fired?

A. Yes.

Q. Did you have any official commission to organize it?

A. I did.

Q. From whom?

A. Samuel Gompers.

Q. How many men were organized in your local at that time?

A. In round numbers about eight hundred.

Q. Did they walk out when you were fired?

A. I beg pardon?

Q. Did they walk out when you were fired?

A. No; they indicated that they would like to.

Q. Why didn't they?

A. I asked them not to.

Q. Were they electricians, or what was their *carft*?

A. They were laborers, laboring people in the cement mill.

Q. Now, there was another union that you were connected with, I have forgotten what it was.

A. Yes, sir; that was the International Brotherhood of Electrical Workers.

Q. Did you help organize that, or were you just a member?

A. I did not; I was a member.

. . . . . .

[fol. 296] By Mr. Chubb:

Q. Does The Wallace Corporation have any interest in the Woodyard Publications, property interest, that you know of?

A. They do not.

Q. Does any officer, agent, employee, or stockholder of The Wallace Corporation that you know of have any interest in the Woodyard Publications?

A. They do not.

Q. Does anybody connected with the Woodyard Publications, directly or indirectly, have any property interest in The Wallace Corporation, that you know of?

A. None that I know of.

Mr. Chubb: I can not think of anything further at this time.

Trial Examiner Spencer: Well, I wish that you would narrow your question down for the witness. If you would like, I will ask him if he has any interest in The Wallace Corporation.

[fol. 297] Mr. Chubb: Do you have any interest in The Wallace Corporation?

The Witness: I do not.

Mr. Chubb: You refer to property or financial interest, I suppose, not to your interest as a publisher?

The Witness: That is right.

Mr. Chubb: Is that what you wanted me to bring out?

Trial Examiner Spencer: Yes.

Mr. Chubb: That is all.

. . . . . .

[fol. 298] By Mr. Richie:

Q. Now, state whether or not the paper of which you are the editor had any definite editorial policy with reference to labor unions and their activities?

A. May I ask a question?

Q. Yes.

. . . . . .

[fol. 299] Q. I will ask you, Mr. Thompson, what particular practice or circumstances were responsible for your adopting the policy expressed by your editorials that have been introduced in evidence with relation to the labor situation at Richwood?

A. From observation of the invasion of the town and community that I serve by representatives of the CIO whose activities I considered radical.

Q. Were you influenced in the position which you took in those editorials by any general attitude towards organized labor as a whole?

A. I was not.

Q. Were you influenced by any general antagonism or unfriendliness towards the CIO organization as a whole?

A. I was not.

Q. In the preparation of these editorials were you in any respect influenced by the fact that you were acting as the business agent for two local independent organizations or either of them?

A. When I began writing and publishing this series of [fol. 300] editorials, I was not business agent.

Q. Well, just why did you write them?

A. My conviction that the things that were being done, previously referred to as radicalism, were contrary to the interest and general welfare of the community that I was serving.

Q. In the preparation and publication of these editorials, did you have it in mind to aid any particular person or organization or set of individuals, or was it your purpose to affect only the community in general?

A. It was my purpose to affect the community in general, exclusive of any other interest.

Q. Were you acting either under the direction or at the suggestion, either express or implied, of anyone connected with either of the two local Independent unions?

A. I was not.

Q. In writing those editorials?

A. I was not.

Q. In the writing and publication of these editorials, were you acting in behalf of The Wallace Corporation or any of its agents?

A. I was not.

Q. Was anyone connected with The Wallace Corporation, or anyone on behalf of any person connected with The Wal-

lace Corporation or connected directly or indirectly with [fol. 301] The Wallace Corporation, in any wise responsible for your preparation of these editorials?

A. They were not.

. . . . . .

Trial Examiner Spencer: Now, you have testified that you attended the meeting at the Groves home. I believe you testified that was the first meeting of the Independent that you attended; is that correct?

The Witness: That is correct.

Trial Examiner Spencer: Will you tell please, how you [fols. 303-308] came to attend this meeting, this first meeting?

The Witness: I was invited.

Trial Examiner Spencer: By whom?

The Witness: Through a telephone call that said it was Mrs. Groves, Mrs. Lundy Groves, and I have no reason to doubt it. However, at that time I did not know Mrs. Groves.

Trial Examiner Spencer: Do you know who the person was speaking to you?

The Witness: Over the phone?

Trial Examiner Spencer: Yes.

The Witness: That is what I meant by that.

Trial Examiner Spencer: Were you acquainted with Miss Weese sometime before the meeting, sometimes referred to as Mrs. Groves?

The Witness: I was.

Trial Examiner Spencer: Did you have any communication with her with reference to this meeting at Mrs. Groves' home prior to the meeting?

The Witness: I did not.

Trial Examiner Spencer. Is it your testimony then that she did not suggest that you attend this meeting or have any conversation with you at all relative to the meeting?

The Witness: She certainly made no suggestion to me to attend the meeting.

. . . . . .

[fol. 309] MRS. ROXIE DODRILL

. . . . . .

[fol. 310] Direct examination.

By Mr. Shroyer:

Q. And where do you live, Mrs. Dodrill?
A. Richwood.
Q. Is that Miss Dodrill, or Mrs. Dodrill?
A. Mrs.
Q. And were you ever employed by The Wallace Corporation?
A. Yes, sir.
Q. And how long were you employed there?
A. Oh, about four years.
Q. And when did your employment cease; well, first, during what period of time; was it continuous employment?
A. Yes, sir.
Q. And when did your employment cease?
A. When they locked us out at the gate, I guess.
Q. You worked until on or about March the eighteenth when the group of employees were laid off?
A. Yes, sir.
Q. And what job or jobs have you held there?
A. I worked for Mr. McIlwee.
Q. In what department is that?
A. Upstairs, machines, on machines; I have worked for Alva Sleeth, packing department.

Mr. Shroyer: Are these the two gentlemen the witness has mentioned the foremen of those respective departments?

[fol. 311] Mr. Chubb: McIlwee is, I know. Do you know about Sleeth, I think he is?

Mr. Davis: He is.

By Mr. Shroyer:

Q. In which department were you working at the time of your layoff, the time your employment ceased?
A. In the packing department.
Q. And that is under who?
A. Sleeth.
Q. And do you remember about when you transferred from the other department into this packing department?
A. I had been working just about a year when I was transferred.

Q. Now, are you a member of any labor organization?
A. Yes, sir.
Q. Which one?
A. The C. I. O.
Q. Do you know about when you joined?
A. Yes, sir; when they first began signing up.
Q. Well, in the late summer or early fall of 1941, would that be approximately correct?
A. Yes, sir.
Q. And did you ever at any time have any conversation with your foreman Sleeth with reference to the C. I. O.?
A. Yes, sir.
Q. When did you have such a conversation?
[fol. 312] A. Well, just before the strike Mr. Sleeth and I was talking and it was rumored around in the factory that——

. . . . . .

Trial Examiner Spencer: If you please, just tell us what was said.

The Witness: I asked Mr. Sleeth what he had told us in the factory about the company taking care of the people and he said that Mr. Davis had been down to St. Louis and had a talk with Wallace and he said Wallace told him not——

Mr. Chubb: We will object again to this long distance repetition of what Sleeth said Davis said Wallace said in St. Louis; I think it is going just a little bit too far.

Mr. Shroyer: All of them, I think, are officials of the company.

Trial Examiner Spencer: I will overrule the objection. Tell us what Mr. Sleeth said to you.

The Witness: Mr. Sleeth said he was told to tell the people the ones that did not sign up with the C. I. O. didn't have anything to worry about, that the company would see that they was taken care of.

Trial Examiner Spencer: Now, did Sleeth say *how* gave him that instruction?

[fols. 313-314] The Witness: Well, I remember telling them——

Trial Examiner Spencer: Well, answer my question, did Sleeth say who gave him that instruction?

The Witness: He said that Mr. Davis gave him them orders.

By Shroyer:

Q. Did you at any other time during this period prior to the strike have any conversations with Mr. Sleeth with reference to the union?

A. He asked me one day why I wore that old C. I. O. button, he said he would be ashamed to wear them.

. . . . . .

By Mr. Shroyer:

Q. Were you wearing the C. I. O. button?

A. Yes, sir.

Q. While you were working? Now, you went out on strike with the other employees, did you?

A. Yes, sir.

Q. Then you returned to work after the strike was settled; is that correct?

A. Yes, sir.

. . . . . .

[fol. 315] By Mr. Shroyer:

Q. Do you know Ancil Smith?

A. Yes, sir.

Q. Who is he?

A. He is a machine man, he works for Wilbur McIlwee, fixes machines.

Q. Did you ever work in that department?

A. Yes, sir.

Q. That is when you were working under McIlwee?

[fols. 316-317] A. Yes, sir.

Q. Are you acquainted with the work that Mr. Smith performs?

A. Yes, sir.

Q. Tell us everything that he does there that you have seen him do.

A. Well, when a machine is broken down and needs fixing, he repairs them and if—like one machine breaks down and he needs to send a girl to another machine, why he tells her to go somewhere else to work, if Mr. McIlwee is not there.

Q. How large is that department?

A. I don't understand.

Q. How many girls work in that department?

A. I couldn't say exactly, but I believe it was about 12, whenever I worked there.

Q. What does Mr. Smith do when Mr. McIlwee is not present?

A. Well, he fixes machines and looks after the plant when he isn't there.

Q. Did you ever receive any orders from Mr. Smith?

A. Yes, sir.

Q. What was the nature of the orders?

A. Well, I was working on a quarter pound machine and when I would be out of veneer or the machine would be broken down, Mr. Smith would tell me to go to another machine to work.

. . . . . .

[fols. 318-320] Cross-examination.

By Mr. Chubb:

Q. Mrs. Dodrill, you are the wife of Harvey Dodrill; aren't you?

A. Yes, sir.

. . . . . .

[fol. 321] Q. Now, you said, Mrs. Dodrill, that you have talked with Sleeth about what Mr. Davis told Mr. Sleeth and Mr. Wallace said.

Wasn't that right? You said that; didn't you?

A. Yes, sir.

Q. Now, who was there when Mr. Sleeth told you that?

A. Glenna Hannah.

[fols. 322-333] Q. Who else?

A. Ira Cruse.

Q. Yes.

A. And myself.

Q. And Glenna Hannah and Ira Cruse were they members of the C. I. O. or not?

A. I think so.

Q. You think they were, both of them.

A. Yes.

Q. Now, when you talked to him, that is to say, Sleeth, and he asked you why you joined the C. I. O., that was before the strike; was it?

And he said he would be ashamed to wear an old C. I. O. button, you said; that was before the strike.

A. When he asked me about the button it was after the strike.

Q. Well, I understood you to say that that was before the strike.

You are pretty sure it was after the strike had started; are you?

A. It was after we had went back to work after the strike; after we had went back to work.

. . . . . .

[fol. 334] ORVILLE SMITH

. . . . . .

Direct examination.

By Trial Examiner Spencer:

Q. Take the witness stand. Call your name and address, please, sir.

A. Sir.

Q. Your name and address.

A. You will have to talk kind of loud to me because I am hard of hearing.

[fols. 335-339] Q. All right. Let's have your name.

A. My name is Orville Smith.

By Mr. Shroyer:

Q. Where do you live, Mr. Smith?

A. 22 East Cranberry Street, Richwood.

Q. You were subpenaded to come here today; were you?

A. Yes, sir; I think so.

Q. What is your b-siness or occupation, Mr. Smith?

A. You mean——

Q. What are you doing at the present time?

A. Making springs for The Wallace Corporation.

Q. Is that down at The Wallace Corporation's plant?

A. Yes, sir.

Q. You are still employed there.

A. Yes, sir.

Q. And you were employed there yesterday.

A. Yes, sir.

Q. How long have you been employed by The Wallace Corporation?

A. Well, I would say approximately 17 years.

. . . . . .

[fol. 340] Cross-examination.

By Mr. Chubb:

Q. Mr. Smith, you did join--you say you signed a card with the CIO.

A. Yes, sir; I signed an application card.

Q. Do you know whether your application to join was ever granted or not?

A. Well, sir, I don't know whether it were or not; I never seen the card after I signed it; the fellow that signed me up said that the card would be held for a certain amount of time and I don't know what became of the card; I never seen it afterward.

Q. Where was it that you were approached on this matter, Mr. Smith?

A. I were working at my present job when this occurred.

Q. You said you were working on the clothespin springs; is that right?

A. Yes, sir; I were working on a spring winding machine; when I operated over there when I were working, why, this man come in and signed me up.

[fols. 341-344] Q. That was during working hours.

A. Yes, sir.

Q. Was the man one of the workmen in the factory?

A. He was supposed to be employed the same as I was only he was working in another department; he was in the shop and I were making springs.

Q. Do you know whether he was supposed to be working when he was talking to you?

A. Yes; I think so.

Q. He was on your shift.

A. Yes, sir; he was on the same shift I was.

Q. Now, who is this person?

A. How?

Q. Who is this person?

A. That asked me to sign that card?

Q. Yes.

A. Mr. Dean. I don't know his given name. But we call him Dean over there. He was an electrician.

. . . . . .

[fol. 345] Q. Did you join the union before that?

A. I joined the union before this strike happened.

Q. I see.

Well, now, after the strike was over and you applied for membership in the independent union did they tell you that you were elected?

[fol. 346] A. Well, I think they taken you in—I went in with a group; I think they were seven made applications and they voted on those applications.

Q. You say there was several.

A. Seven employees went in and signed the cards; seven of them went in at once, in other words, and they were voted on, and I think all the seven were carried, that is, we became membership.

. . . . . .

[fols. 347-350] Q. Now you think that you were one of a group of seven in the same fix.

A. Yes.

Q. Do you know whether there was other folks voted on by the independent union after you were voted on?

A. After I were voted in?

Q. Yes.

A. Yes, sir; I think there were.

Q. You think there were.

But you did not mean to say that there were only seven that got back into the independent union.

A. No, sir; what I mean by that, that there was seven applications went in with mine.

. . . . . .

[fol. 351] Mrs. Minnie Givens.

. . . . . .

Direct examination.

By Trial Examiner Spencer:

Q. Call your name, please.

A. Mrs. Minnie Givens.

By Mr. Shroyer:

Q. Is it Miss or Mrs. Givens?
A. Mrs. Givens.
Q. Where do you live, Miss Givens?
A. McCarthy Avenue, Richwood.
Q. Are you employed by The Wallace Corporation?
A. Yes, sir.
Q. You were working there now.
A. Yes, sir.

. . . . . .

[fol. 352] Q. Were you at one time also a member of the CIO?

A. Well, I signed a card but I never paid any dues.

Q. When did the join the independent with reference to the strike?

A. Well, the day before the election.

Q. Before the election.

A. Yes, sir.

Q. Do you know Harry White?

A. Yes, sir.

Q. What is his position in the plant?

A. He is the boss of the saw room.

Q. Did you work under him?

A. No, sir.

Q. Is he a neighbor of yours?

A. Yes, sir.

Q. Live in the same block?

A. Yes, sir.

Q. Did you have any conversation with him during the strike?

A. Yes.

Q. Will you tell us just when it happened and what was said?

A. Well, I can't remember just when it did happen. It was shortly after the strike.

[fol. 353] Q. After the strike begun you mean.

A. Yes.

Q. Well, what was——

. . . . . .

A. Well, he just come down on his bicycle, you see, and he said they was going to bring cards around and wondered if I would consider signing one.

He didn't have one himself.

By Mr. Shroyer:

Q. Did he say what kind of cards they were?

A. No; not as I remember.

Well, he says, "You know they will never run under the CIO."

. . . . . .

[fols. 354-361] Cross-examination.

. . . . . .

[fol. 362-364] By Mr. Chubb:

Q. Mrs. Givens, I am showing you a postal card that has been marked Respondent Wallace's Exhibit 10, and ask you if you can identify that; do you know what that is; just take it?

A. That is the kind of a card I got.

Q. You got that kind of a card?

A. Yes, sir.

Q. Did you get it in the mail?

A. Yes, sir.

. . . . . .

[fol. 365] Trial Examiner Spencer: Counsel, it is a little out of order, the usual order, and if you have no objection, will you offer the card?

Mr. Chubb: Oh, I beg pardon. I intended to offer it. I say I intended to. I did not know it was in existence until a few minutes ago, but I am glad to offer in evidence this card, Respondent's Exhibit — as a matter of fact, Mr. Trial Examiner, this is only for identification.

Mr. Shroyer: I will be glad to offer it.

. . . . . .

[fols. 366-367] Mr. Shroyer: Will you re-mark this as Board's Exhibit 4?

Mr. Chubb: And that will make the Board make a duplicate out of it. That is another thing.

(The document referred to was re-marked Board's Exhibit 4 for identification.)

Mr. Shroyer: I now offer in evidence Board's Exhibit 4.

Trial Examiner Spencer: Is there an objection?

Mr. Ritchie: No objection.

Trial Examiner Spencer: As there is no objection, it is received.

* * * * * * * *

[fols. 368-369] J. E. BASHAW.

* * * * * * * *

Direct examination.

By Mr. Shroyer:

Q. Have you ever been employed by The Wallace Corporation, Mr. Bashaw?

A. I have.

Q. For how long a period of time?

A. Well, I was there before it became The Wallace Corporation, Steel-Wallace was the name.

Q. How long ago was that?

A. It has been—December of 1932 when I commenced there.

Q. When did your employment there stop?

A. The 16th of March was the last work I done.

* * * * * * * *

[fol. 370] Q. What department had you been working in, Mr. Bashaw?

A. Saw room.

Q. And who was your foreman?

A. Well, there was my foreman and an assistant foreman; Harry White and Carm Reese.

Q. Which was which?

A. Harry was supposed to be the foreman when he was there, and Carm Reese was foreman when he was not there.

Q. Are you familiar with the duties and jobs that Carm [fol. 371] Reese performed?

A. What is that?

Q. Are you familiar, do you know just what Carm Reese did at the plant?

A. Well, he done oiling and was assistant foreman when White would not be there and he would give orders around.

Q. Did he ever give you any orders?

A. He did.

Q. What were the nature of the orders?

A. Well, when we would be getting logs, I was getting logs on the deck, and when we would be getting a certain length of log, if he wanted a different length he would come around and tell me to get so and so length and when he got enough of them he would tell me, "We have got enough of them," to get another length.

Q. Would this be when Harry White was there or when he was not there?

A. When he was not there.

Q. When he was not there?

A. Yes.

Q. What would Mr. Reese do when Mr. White was there?

A. Well, he done oiling and if anything would break he would help fix it, when anybody wanted anything and White was not right there, they would call him instead.

Q. Was White frequently absent?

[fol. 372] A. Which did you say?

Q. Well, was there frequently times when White was not there?

A. Well, there was; sometimes it would be an hour or two, or two or three hours I would not see him around, he might have been in some other part of the plant or somewhere, I don't know.

Q. Does Mr. White have more than one room to supervise?

A. No, just the saw room. Well, you will find him up there at the pond, but just one man works down there.

Q. The pond is outside?

A. Yes, and then there is the rattle room I think he looks after that.

Q. By rattle room, you mean a department upstairs?

A. That is part of it, he has about one man up there, I think, the rattle room.

. . . . . .

Cross-examination.

By Mr. Chubb:

Q. Mr. Bashaw, you belonged to the CIO sometime during this affair?

A. Yes, sir.

Q. When did you join?

A. Oh, I wouldn't say just exactly when.

Q. Well.

[fol. 373] A. I wouldn't say just exactly when I joined.

Q. Would you know whether it was before the strike or after the strike?

A. Well, I signed up before the strike.

Q. You signed up before the strike?

A. Yes.

Q. Who asked you to join up?

A. The first fellow that asked me was a man that worked at the paper mill, CIO.

Q. The paper mill fellow?

A. That is right.

Q. Have you worked at all since the 17th of March or the 18th of March?

A. Have I worked at all?

Q. Yes.

A. No.

Q. Been out of work since the 17th of March?

A. Yes, sir.

Q. Did you sign up, try to join the Independent Union, the Richwood Clothespin and Dish Workers Union before you quit?

A. Before I quit?

Q. Before you were laid off?

A. No, sir.

Q. You never did apply for membership?

[fols. 374-375] A. No, sir.

Q. You just kept your membership in the CIO, did you?

A. That is right.

Q. You never tried to become a member of the other union, is that it?

A. No, sir; not yet I haven't.

. . . . . .

[fol. 376] Q. Now, Carm Reese, when you talked to him, what did you call him, Carm?

A. I called him "Boss."

Q. Boss?

A. Yes.

Q. *Had* long had you been doing that?

A. Oh, about ever since he has been the boss, and assistant boss.

Q. Well, how long is that?

A. Well, I don't know.

Q. You wouldn't know?

A. No.

Q. You went to work there in December, 1932?

A. That is right.

Q. Was Carm Reese working there then?

A. No, he wasn't.

Q. And you have been working in the same place all that time?

A. No, not the same job.

[fol. 377] Q. Where did you work first?

A. Well, I worked right over the saw room at different jobs.

Q. Different jobs in the saw room?

A. Yes.

Q. When did you first know about Carm Reese?

A. I know about him a good while before he went to work there.

Q. You knew him before he went to work for Wallace?

A. Yes, sir.

Q. And did he go to work in the saw room too?

A. I don't know whether he worked in there or not before he went in the saw room.

Q. Did he go to work in the saw room after you were working there?

A. Yes, sir.

Q. Well, what did he go to work at when he was first in the saw room?

A. Sir?

Q. Well, what did he go to work at in the saw room after you were working there, when you first saw him in the saw room?

A. Floor boy.

Q. He was floor boy in the saw room?

A. Yes, sir.

Q. Now he is the oiler, is he?

[fol. 378] A. Oiler and assistant foreman.

Q. Well, he is also the oiler, is he?

A. He does oiling.

Q. What does the oiler do?

A. He does the oiling.

Q. What else?

A. That is about all the oiler does, but the assistant foreman gives orders when there is nobody else to give them.

Q. I am not asking you that. I asked you what he does.

A. I told you what he does, he oils.

Q. What does he oil?

A. Oils the machines.

Q. What machine is there down there to oil?

A. Well, you would have to go over there and find out.

Q. You just tell me, if you know.

A. I couldn't tell you all of the machines that is in there.

Q. Now, does he do any work in the file room, the oiler?

A. In what?

Q. In the file room.

A. I think maybe he works in there a day or two extra when the helper would be off in there.

Q. Does he oil machines in the file room?

A. He doesn't when he is oiling outside? When he works in the file room, I suppose he does.

[fol. 379] Q. Don't you know whether he oils machines in the file room?

A. In the file room?

Q. Yes, there is a saw filing room there, isn't there? Where they file the saws—right off the mill, isnt' there, it is in Harry White's department, isn't it, the filing room?

A. No, the filing room is off on the side of that department.

Q. And is Harry White the foreman of the file room?

A. I couldn't tell you whether he is or not.

Q. You don't know he is the foreman of the file room?

A. No, I don't.

Q. You don't know, and you have been there since 1932?

A. That is none of my business.

Q. It is none of your business who is the foreman, is that it?

A. In the file room.

Q. Is Harry White the foreman of the fellow that works on the pond, too?

A. Yes, sir.

Q. Now, Mr. Reese is also the oiler of the machinery in the mill room, but you don't know whether he oils the machinery in the file room or not?

A. That is right.

[fols. 380-384] Q. You don't know whether he does or not?

A. I don't work in the file room; how do I know what he does in there.

Q. The file room is rather close to the mill, isn't it?

A. Yes.

Q. You never did see Mr. Carm Reese go in or out of the file room?

A. Yes, I saw him, yes.

. . . . . .

[fol. 385] Trial Examiner Spencer: If I understood you correctly, you testified that Harry White asked you to join the Independent?

The Witness: He did.

Trial Examiner Spencer: Is that correct?

The Witness: Yes.

Trial Examiner Spencer: And when did he ask you to join the Independent?

The Witness: Well, it was the last night we worked, on the 16th, I would say.

Trial Examiner Spencer: That was in March of this year?

The Witness: Yes, sir.

Trial Examiner Spencer: Will you tell me the circumstances under which he asked you to join the Independent, where you were, what time it was, and the circumstances?

The Witness: Well, I was a-working and he worked to a certain time in the evening, and then he went home, and before he went home this evening, why he called me out and tried to get me to sign one of them cards. I said——

Trial Examiner Spencer: Now, what do you mean by "one of them cards"?

The Witness: Well, it was a card to join the Independent Union and he said if I didn't join at that time I would not have no work.

[fol. 386] Trial Examiner Spencer: Did he have a card with him? Did White have a card with him?

The Witness: He did not show any.

Trial Examiner Spencer: Now, is this the same Harry White that you have testified was your foreman?

The Witness: Yes, sir.

Trial Examiner Spencer: Did you have a question?

Mr. Shroyer: No, the only thing I wanted to go into was what you have already developed.

Trial Examiner Spencer: Mr. Chubb, did you have a question?

By Mr. Chubb:

Q. Mr. Bashaw, when Harry White talked to you like you say here and wanted you to join, didn't you know that you were supposed to either sign up with the Independent Union before the 17th or that you could not go back to work?

A. I knew that is what they said.

Q. Well now, what do you mean by that?

A. How?

Q. Who do you mean by "they said"?

A. Well, the follows that had the cards.

Q. The fellows that belonged to the Independent that had the cards?

A. Yes.

Q. Harry said he would like you to come back to work, [fol. 387] didn't he?

A. He said he hated to see me quit, or something like that.

Q. Hated to see you quit?

A. Hated to see me have to quit, he said.

* * * * * * *

MRS. PEARL STEWART

* * * * * * *

[fols. 388-389] Direct examination:

By Mr. Shroyer:

Q. That is Mrs. Stewart of Miss Stewart?

A. Mrs. Stewart.

* * * * * * *

Q. And have you ever been employed by The Wallace Corporation?

A. Yes, sir.

Q. For what period of time?

A. Well, I worked there about 24 years ago and then I worked there in the last three years.

Q. Up until March 17th?

A. Yes, sir.

Q. That was the end of your employment?

A. Yes, sir.

. . . . . .

[fol. 390] Q. Now, what department were you working in at the Wallace Factory, what was your job?

A. In the clothespin department.

Q. Who was your foreman?

A. Clark Gibson.

Q. Do you know Lundy Groves?

A. Yes.

Q. Did he also work in that department?

A. Yes, sir.

[fol. 391] Q. Do you know what he did there?

A. He was lathe man.

Q. Well, are you familiar with the work that he did?

A. Yes, sir.

Q. Will you tell us what he did?

A. I worked for him right smart, he was lathe man and when Mr. Gibson wasn't there, he was boss, foreman.

Q. Did he ever give you any orders?

A. Yes, he has given me orders several times.

Q. How would he give you orders?

A. Give me orders when there wasn't anything to do.

Q. Any other orders?

A. Well, he would tell me some machines to run, and things like that.

. . . . . .

Cross-examination:

By Mr. Chubb:

Q. He kept the machines in order, didn't he?

A. Yes, sir.

Q. Those were clothes pin lathes, were they?

A. Yes, sir; and toy machines.

Q. And toy machines.

A. He run them together.

Q. Lundy?

[fol. 392] A. Yes, sir.

Q. Did he sharpen the knives on them?

A. Yes, sir.

Q. Pretty busy during most of the day?

A. Not all of the time.

Q. Most of the day?

A. Well, that was his job.

* * * * * * *

Q. Were you a member of the CIO union?

A. Yes, sir.

Q. When did you join?

[fol. 393] A. I joined a little bit after it first started.

Q. No one came and told you not to join before you joined?

A. No, sir.

Q. You just joined because you thought it was the proper thing to do?

A. Yes, sir.

Q. You are married?

A. Yes, sir.

Q. Does your husband work at the factory?

A. He works in the paper mill.

Q. He was a CIO man too?

A. Yes, sir.

Q. Were you working there at the time the strike started?

A. Yes, sir.

Q. Do you know about this other union, the Independent Union?

A. Yes, sir.

* * * * * * *

[fol. 394] Q. A good deal of feeling between the members of one and the other?

A. I guess there was.

Q. A good deal of trouble on the picket line, wasn't there?

A. No, we didn't have any trouble on the picket line.

Q. You had a lot of people on the picket line?

A. Only just our members.

Q. Weren't there a lot of people come up there?

A. Oh, they would come there and visit a little bit, but not to stay.

Q. Were you there when they had any trouble?

A. No, sir.

Q. Did you receive any card in the mail about coming back to work?

A. Yes, sir.

Q. Were you a member of the CIO at that time?

A. Yes, sir.

Q. Was that a card from the company?

[fols. 395-399] A. Yes, sir.

Q. And do you remember anything that was stated on the card?

A. Well, I couldn't tell you just exactly what it said, but——

Q. I will show you a card that has been marked Board's Exhibit 4; is that the card that you received?

A. Yes, sir.

Q. What did you do with it when you got it?

A. I turned it in to Mr. Farmer.

Q. Did Mr. Farmer come down and ask you for it?

A. No, sir; he didn't; I gave it to him.

Q. How did you happen to give it to him, Mrs. Stewart?

A. Well, I didn't sign it, so I just gave it to him.

Q. Didn't you want to go back to work?

A. Not that way.

Q. Not that way; what do you mean by "not that way"?

A. Well, I wanted to go out the way we went, I mean to go back to work the way we wanted.

Q. You mean you wanted to unionize the plant before you went back to work?

A. Yes, sir.

. . . . . .

[fol. 400] Redirect examination:

By Mr. Shroyer:

Q. I believe you stated, Mr. Stewart, that you saw the Independent members going to their first meeting. I wish you could elaborate and tell us a little bit more about it.

. . . . . .

[fol. 401] By Mr. Shroyer:

Q. Just tell us what you saw that night, if anything, or anybody.

A. A bunch of us girls was on the picket line and we went over on the street. Well, we seen this bunch going down toward Mr. Groves' house.

Q. Did you recognize any of them?

A. Yes, I could recognize some of the others.

Q. What do you mean, you could recognize some of the others?

A. The ones that was going to that meeting.

Q. Who were they?

A. Jim Butler and Smith and his wife.

Trial Examiner Spencer: Now, what Smith is that?

A. And Ivy Keener.

Trial Examiner Spencer: Do you know what Smith that is?

A. Ansel Smith. So I just went up there on the corner there where the liquor store is, and we run into Clark [fol. 402] right there, he and a bunch of them was on this side there, and he was talking to them and——

Q. Well, who was talking to them?

A. Clark Gibson, and they turned and went back to Verdie Groves' house, and that is where they had their meeting.

Q. Did you talk with Verdie?

A. No, but I know that is where they went.

Q. You did not follow them over there?

A. No.

Trial Examiner Spencer: Could you overhear anything that was said between them and this Gibson?

The Witness: No, I did not.

Cross-examination:

By Mr. Chubb:

Q. Mr. Gibson was turning them away?

A. Well, he told others that there was too many CIO's watching.

Q. Just a minute. What did you hear him say?

A. I didn't hear him say that.

. . . . . .

[fol. 403] Q. That was in the middle of the town?

A. Yes, sir.

Q. Right down Main Street?
A. Yes, sir.
Q. Grove's house is down across the river, isn't it?
A. It is on the south side.
Q. It is on the south side?
A. Yes, sir.
Q. Do you know what happened to Gibson after that?
A. No, sir; I don't.
Q. Where did Gibson live?
A. On Main Street.
Q. He lived on Main Street?
A. Yes, sir.

[fols. 404-415] Q. How long had you seen this bunch going down to the meeting until you saw Gibson there on Main Street?

A. Well, that is when they was starting to their meeting down at his house and he met them there.

Q. But you said you were on the picket line, you saw a bunch of people going down there?

A. And we went over town from the picket line.

Q. You saw the people going over there?

A. They was starting down that way and I met him there, so I don't know what he told them.

. . . . . .

Redirect examination.

By Mr. Shroyer:

Q. One thing. How far is the Wallace Plant from this Main Street we are talking about, in Richwood?

A. Oh, I don't know.

Q. With reference to blocks?

A. About 200 yards, something like that.

. . . . . .

[fol. 416] Colloquy re Board's Exhibit 5

Trial Examiner Spencer: We will go on the record. The hearing is in order.

Mr. Shroyer, if you have in your possession the charge that was filed against The Wallace Corporation prior to the settlement agreement and which is referred to in the settlement agreement, I would like to have it in evidence, if you have no objection.

Mr. Shroyer: Well, I have looked through that file and I find a Second Amended Charge filed in case No. IX-C-1478, which was docketed in the Ninth Region of the National Labor Relations Board on October 10, 1941. This is the last charge prior to the settlement agreement, I believe.

Mr. Reporter, will you mark this Board's Exhibit 5, I believe?

(The document referred to was marked Board's Exhibit 5 for identification.)

Trial Examiner Spencer: Do you know whether this is the charge that the union in the settlement agreement agreed to recognize the withdrawal of?

Mr. Shroyer: That is correct, Mr. Examiner.

Trial Examiner Spencer: Now, do you know whether or not an investigation was made by the Regional Office of this charge prior to the settlement agreement?

Mr. Shroyer: A field examiner for the Ninth Region [fol. 417] conducted an investigation in Richwood and about concerning this charge.

Trial Examiner Spencer: Very well.

Mr. Shroyer: I offer Board's Exhibit 5 for identification in evidence.

Mr. Chubb: No objection.

Trial Examiner Spencer: There is no objection; it is received.

(Board's Exhibit 5, previously marked for identification, was received in evidence.)

. . . . . .

[fol. 418] WILLIAM WILSON

. . . . . .

Direct examination

By Mr. Shroyer:

Q. What is your name?
A. William Wilson.
Q. Is that W-i-l-s-o-n?
A. Yes, sir.

Q. And where do you live, Mr. Wilson?

A. Richwood.

Q. Have you ever been employed by The Wallace Corporation?

A. Yes, sir.

. . . . . .

By Mr. Shroyer:

Q. Just tell us when you went to work the last time and when your employment ceased?

A. Well, it was sometime along about the last of January [fol. 419] or sometime, sometime the first of February I worked the last time, 1942.

Q. And the last date you worked there was March 17th when the other 43 people were denied employment?

A. Yes, sir; that was the last day.

. . . . . .

Q. I want to know who hired you the last time.

A. Well, the last time I met Carm Reese on the street and he told me that the night shift was a-going to start and he told me what time it was going to start.

Q. When was this, Mr. Wilson?

A. Well, this was along about the last part of January, he told me when the night shift was going to start.

Q. Do you know when the strike started at the Wallace Plant?

A. Yes, sir; sometime in September.

Q. Well, with reference to the time the strike started, can you give us the time that Mr. Reese met you on the street that you have mentioned?

A. Well, Mr. White hired me that time.

Q. Is that Harry White?

A. Yes, sir; Harry White.

Q. Where did you see him?

A. I saw him at the factory.

[fol. 420] Q. And did you ask him for employment, or what happened?

A. Yes, I asked him for employment.

Q. What did he tell you?

A. Well, he give me a job.

Q. Did you go to work immediately?

A. No; I didn't go to work; I was supposed to go to work on Friday night, Thursday or Friday, and the strike come on before I went to work, they struck the same day that I was a-going to work and I didn't go to work.

Q. This conversation with Carm Reese, when did that occur?

A. Well, that occurred two or three days before that.

Q. Before what?

A. Before I went to work, before the strike.

Q. Well, was it before or after you were talking to Mr. White?

A. Well, it was before I was talking to Mr. White.

Q. What did Mr. Reese tell you?

A. He told me they was a-going to start the night shift and to get ready and come to work.

Q. Did he tell you what department you would work in?

A. Yes, sir.

Q. What department?

A. Saw room.

Q. Did he tell you who would be the foreman?

A. He told me that he would be the boss.

[fol. 421] Q. That he himself would be the boss?

A. Yes, sir.

Q. Have you ever worked in that department before?

A. Yes, sir.

Q. Well, did you actually come to work before the strike?

A. No, I didn't come to work, they struck the day that I was supposed to go to work that evening.

Q. Well then, after the strike had been settled, did you go to work?

A. Well, after the strike was settled I went to work.

Q. And what department did you work in?

A. I worked in the saw room.

Q. And you knew your foreman?

A. Well, Carm Reese was my foreman; night foreman.

Q. Did you work nights or days?

A. I worked nights.

Q. Was Mr. White also on duty at the time you were working?

A. Well, he was there a little while of evenings, probably a couple of hours.

Q. And what part of the evening would he be there?

A. Well, between 7 and 10 o'clock, or 9, something like that.

Q. And how long did you work?

A. Well, I worked two or three days, I think I drawed about four checks.

[fol. 422] Q. I mean, how much of the night did you work, Mr. Wilson?

A. Oh, I worked from about 4 o'clock up until 12:30 or 1:30, I don't remember now.

Q. And after Mr. White left in the evening, who did you receive orders from?

A. Carm Reese.

Q. Did he ever give you any orders?

A. Yes, sir.

Q. What kind of orders?

A. Well, he told me what to do and showed me what to do and when to make the change and so forth.

[fols. 423-427] Cross-examination.

[fol. 428] Q. Now, you talked to Carm Reese; what did Carm Reese do around the mill room there?

A. Well, he——

[fol. 429] Mr. Shroyer: Counsel, would you limit it to a definite period of time?

Mr. Chubb: Well, at the time he is talking about, you were talking about the period after the strike when you went back to work, I think, Mr. Wilson, weren't you, that is what you were talking about?

A. Yes, after the strike.

Q. After you went to work, and I am asking you now what duties Mr. Carm Reese had that you know of at that time down there in the mill room.

A. Well, I seen him doing practically about everything anybody done.

Q. He was pretty busy, wasn't he?

A. Yes, pretty busy.

Q. Give us a little detail on that, please.

A. What he was a-doing?

Q. Yes.

A. Well, he done practically everything.

Q. Wasn't he the oiler?

A. Yes, he was the oiler.

Q. That was his principal job, wasn't it?

A. Yes, sir.

Q. What else?

A. Well, any time that anybody needed anything or anything would break, need to be repaired, he would repair it, and on my job whenever there was a change made, why [fol. 430] he would come and tell me, told me where to clean up at.

Q. What was your job?

A. My job was upstairs in what they called the dry loft, tumbler room.

Q. Oh, you were in the attic?

A. Yes, sir.

Q. Where they dry stuff out?

A. Yes, sir.

Q. You did not see much of him up there, did you?

A. Well, he was up there quite often.

Q. He was up there quite often?

A. Yes, sir.

Q. Quite a ways up there, wasn't it?

A. No, it is not so far.

Q. How?

A. Not so far.

Q. Well, how often would you see him up there?

A. Some days I would not see him up there, and other days I would see him up there quite a few times.

Q. Is that where they have a big rack upstairs, whatever you call it, for the lumber?

A. No, it is for blocks.

Q. Blocks, and they dry the pins up there?

A. Yes, sir.

[fols. 431-433] Q. And these blocks go up there and you have to keep a supply up there, don't you?

A. Yes, sir.

Q. And if the supply runs out, you have to shut down the machines, don't you?

A. I guess.

Q. You know that, don't you?

A. Yes, sir.

Q. You don't have to guess about that. Now, he came up there to see how the supply was, didn't he?

A. Well, he come up to see if I was busy and see if I was a-working or not, and he come up several times I called for repair.

Q. Did he ever bawl you out if you were not working?
A. No, he knows better than that.
Q. How?
A. He knowed better.
Q. You knew he had been there?
A. He told me he was the boss.

[fol. 434] Q. All right. Now, Mr. Wilson, I just want to clear up one thing. As I understood your testimony, before the strike they were going to start a night shift and you were supposed to work on the night shift?
A. Yes, sir.
Q. Is that right?
A. Yes, sir.
Q. And it was White that talked to you about working on that night shift?
A. Yes, sir; and Mr. Carm Reese did too, both of them.
Q. At that time, before the strike?
A. Before the strike.
Q. And they said they were going to start a night shift and they wanted you to come over and work on it, is that right?
A. Yes, sir.
Q. And the plant was running—I mean it was reopening, it was running days, and a night shift was to be started?
A. Well, no, this was before the strike.
Q. This was before the strike?
A. Yes, before there was any.
Q. Now, the night shift did not start, is that right?
[fol. 435] A. No, it didn't start up.
Q. At that time?
A. Yes.
Q. And did you understand why it was both White and Carm Reese had spoken to you?
A. Well, Mr. White told me that Carm was a-going to be the night foreman and for me to see him, see if he were full or not, and I went to see Carm and talked to him for a couple of hours about it.
Q. And then after the strike the plant started up before you went back to work, did it?
A. Well, it started something like three weeks before I went to work, something near that.

Q. And the night shift was slow in getting started after it reopened, is that it?

A. Yes, it was something like three weeks, something near that.

Q. Now, you got the impression from Mr. White after the election, the conversation you had after the election, Mr. White wanted you to come back to work, isn't that right?

A. Mr. White?

Q. Yes.

A. I never saw Mr. White, I saw Mr. Reese and he told me to be sure and come out.

Q. Didn't you say you had a conversation with Mr. White?

[fol. 436] A. Not the last time.

Q. Didn't you say that at the time, or when they said you had to get a card, had to have a card if you wanted to come back to work?

A. That was after I had went to work.

Q. Sure, after the election, didn't you have a talk with White about getting a card if you want to come back to work?

A. This was after that.

Q. How?

A. This was after that period. This was after I went back to work.

Q. Sure. I guess we misunderstood each other. I say, did you say you had a conversation with White after the election, after you went back to work?

A. About every night.

Q. About every night?

A. Evening evening.

Q. Where was that, in the rattle room?

A. That was right on the job.

Q. Right on the job. And White suggested you get a card from the Independent?

A. Yes, sir.

[fol. 437] Cross-examination.

By Mr. Ritchie:

Q. Just one or two questions. I understood you to say that Carm Reese had asked you to come back to work some-

[fols. 438-443] time after the election?

A. Well, I hadn't been working any for about four years at the time that Carm Reese met me on the street and told me that the night shift was a-going to start up and asked me if I was ready to go to work and I told him I was and I went back to work after the strike.

Q. Didn't Carm at that time indicate to you that White wanted you to come back to work?

A. No, sir.

Q. He didn't?

A. No, sir; never mentioned White's name.

Q. You don't know but what Carm was carrying out the suggestion of White, do you?

A. I don't understand you.

Q. As far as you know, Carm, however, might have been carrying out White's suggestion when he asked you to go back to work?

A. Well, probably that could have been.

Q. White was the foreman?

A. Yes; Carm was my foreman.

Q. Carm was your foreman?

A. Yes, sir; on the night shift. Mr. White was the foreman on the day shift.

* * * * * * *

[fol. 444] HARVEY DODRILL

Direct examination.

[fol. 445] Q. Have you been employed by The Wallace Corporation?

A. Yes, sir.

Q. And how long were you employed by them?

A. 13 years.

Q. Was that continuous employment?

(No response.)

Was that continuous employment?

A. Yes, sir.

Q. When did your employment cease?

A. August 1941.

Q. August 1941.

A. Yes, sir.

Q. Did you have any employment with them after that at all?

A. Yes, sir.

Q. And when was the last employment?
A. I worked about seven days.
Q. You worked about seven days.
A. Yes.
Q. Up until when?
A. Well, it was along, I believe, in February.
Q. Were you working there at the time the 43 people were laid off?
A. Yes, sir.
[fol. 446] Q. Or lost their employment.
A. Yes, sir.
Q. Was that the last day you worked there?
A. Yes, sir.
Q. Are you a member of a labor organization?
A. Yes, sir.
Q. What one?
A. United Construction Workers.
Q. We have been referring to that union, Mr. Dodrill, as the CIO.
A. CIO.
Q. So you can address yourself accordingly. When did you join?
A. July 1941, last part of July.
Q. And—Where did you join?
A. At the Richwood High School grounds, on the grounds.
Q. What was going on there at that time?
A. They was a meeting called by the CIO.
Q. A meeting of who?
A. Well, it was a public meeting for the workers of Richwood.

. . . . . .

[fol. 447] By Mr. Shroyer:

Q. Were there any employees of The Wallace Corporation other than yourself present at that high school meeting?
[fol. 448] A. Yes, sir.
Q. About how many?
A. Oh, I would say 12, 10 or 12, that I noticed; pretty good crowd there.
Q. Were there any foremen or supervisors there?
A. Well, I noticed Miss Weese there.
Q. Did you talk to Miss Weese?
A. Spoke to her.

Q. What was the substance of your conversation with her there?

A. Well, I asked her if she was going to join up with the CIO. And she said, "No; it would not be good policy," she said.

Q. Were you and are you an officer in the CIO?

A. Yes, sir.

Q. What office was it you were or are.

A. I were.

Q. And what office did you hold?

A. Vice president and president.

[fol. 449] By Mr. Shroyer:

Q. When you were president of the CIO—When was that?

A. Well, I was elected vice president to start with and later—I don't remember just how long it was afterwards; it was when the campaign first started——

Q. And—Did you serve as president up until the time Jack Griffie was elected president?

A. Yes, sir.

Q. Now after this open meeting that you have testified to will you tell us what was done with reference to organizing the plant?

A. Well, we talked to the organizer, Mr. Farnier, Mr. Gallagher, and they told us they was in here for to organize, to help us organize.

Q. Now I just want to know what you did.

A. Well, we got some cards, took them back with us, tried to get them signed up.

Q. Were you active in signing up members yourself?

[fol. 450] A. Yes, sir.

Q. What department were you working in?

A. Power department, machineshop.

Q. Who was your foreman?

A. Wilbur McIlwee, Sisco Gibson.

Q. Why did you have two foremen?

A. One was the foreman of the machineshop and the other one of the power department.

Mr. Shroyer: Is there any question, gentlemen, about whether or not they are foremen?

Mr. Chubb: McIlwee and Gibson were foremen.

By Mr. Shroyer:

Q. Were you working in both departments?

A. I run the stationary engine and was supposed to work in the machineshop the rest of the time.

Q. And the stationary engine was in one department and the machineshop was in the other one; is that correct?

A. Yes, sir.

Q. Did you have any conversation with Mr. Sisco Gibson with reference to the CIO?

A. Yes, sir.

Q. When was that?

[fol. 451] A. It was during—Some time in July 1941 when the organizing started.

. . . . . .

By Mr. Shroyer:

Q. Will you tell us about that conversation?

A. He asked me if I had ever joined up with the organization.

I told him that I had.

He asked me if I had got anybody else.

I told him I had.

Q. Well, did you say anything about it or was it anything other than what you have told us?

A. He just made a statement that he hoped that we would get into the organization without any trouble but [fol. 452] Wallace had warned that he would never join up, he would never recognize the CIO.

Q. What did he say about Wallace?

A. He said Wallace had warned the meetings that he would never recognize the CIO.

Q. Did you have any conversations with McIlwee with reference to the CIO?

A. Yes, sir.

Q. When?

A. The date? Some time the latter part of July or first of August.

Q. What was that conversation?

A. Well, he warned me once if I didn't quit agitating union and getting signers that we would all be out of a job.

Q. Do you know Harry White?

A. Yes, sir.

Q. Is he also a foreman there?

A. Yes, sir.

Q. Did you ever have any conversation with him in regard to the CIO?

A. Yes, sir.

Q. When?

A. In July.

Q. And what was the substance of that conversation?

A. Well, he wanted to find out how I was a-getting along [fol. 453] with the organization.

Q. What did you tell him?

A. Well, I showed him a bunch of cards I had and told him getting along the best we could.

Q. Now you didn't work, I believe you testified, for The Wallace Corporation, after—from—Was it some time in August?

A. I was laid off in August but I was later rehired and worked seven days before I was voted out by the company union.

Q. There was some period of time before the strike that you were not employed there.

A. Yes.

Q. Is that correct?

A. Yes; about 30 days or so; laid off about 30 days before we come out on strike.

Q. Well—During that period were you active in the union?

A. During the period I was laid off?

Q. Yes.

A. Yes, sir.

Q. You were president of it at that time.

A. Yes, sir.

Q. And were you present at any of these conferences with the management?

[fol. 454] A. Yes, sir.

Q. Were you present at all the conferences?

A. I believe there was one that I missed.

Trial Examiner Spencer: Now do you want to state a time designation for these conferences or do you mean to inquire about them?

Mr. Shroyer: No; I mean with reference to before the strike

A. Yes; I was in conferences before the strike.

By Mr. Shroyer:

Q. Were there several conferences held then?

A. Yes; there was; I don't remember just how many there was; maybe five; something like that.

Q. Do you know the position that the CIO took at these conferences?

A. Yes, sir.

Q. What was it?

A. It was in order to gain recognition.

Q. Well, what did you ask for?

A. We asked for recognition.

Q. And what was the position of the company?

A. Well, we asked for recognition; we asked how we were going about it to determine whether we had a majority or not.

We notified him that we had the majority and——

[fol. 455] Q. When you say "he" who do you mean?

A. Mr. Davis, the superintendent.

And we could not agree on how to count the cards. We offered to let any three preachers count them or pick one man and let him pick one and an individual; and he could not agree to that.

And we offered to let the National Labor Relations Board count them and he would not agree to that. He did agree that we would turn them over to him and Miss Weese and he would turn them and call in everyone that was signed up and ask them if they wanted to belong to the union, whether they wanted the union.

Why, he would give us recognition after he talked to everyone personally.

Q. Did you agree to that proposition?

A. No, sir; we didn't.

Q. No settlement was arrived at at all.

A. No, sir.

By Trial Examiner Spencer:

Q. Was the matter of an election discussed?

A. Yes, sir.

By Mr. Shroyer:

Q. Who proposed an election?

A. Mr. Davis.

Q. And what was your position in regard to an election then?

[fols. 456-459] A. Well, we agreed to an election; Mr. Farmer said that he would if he would put me back to work.

I was laid off and he would not agree to that; he said that I was too much of a union agitator.

Q. Well, during the strike were you active on the picket line?

A. Yes, sir.

. . . . . .

[fol. 460] Q. Did you take part in the conferences between the independent union and the company and the CIO with reference to a settlement of the strike?

A. Yes, sir.

Q. What was the position of the CIO at those conferences?

A. We wanted to meet the independent union and try to agree on a vote, how we would go about it vote on it; and they wanted——

Q. Can you tell us just a little bit more definitely just when these conferences were held or were there more than one conference?

A. That was the only one that we met the independent union on.

Q. When was that one held?

A. 12th of January.

Q. Is this just before the people went back to work?

A. Yes, sir.

Q. Well—Now go on and tell us the position of the two difference unions then.

A. I beg pardon. I didn't hear.

[fol. 461] Q. Tell us the position of the two different unions at that time.

A. Well, we went in and told them that there was—There was an insurance man arranged the meeting for us in his office.

And one side stated their position there and the independent union—The CIO committee did; we agreed to take a vote; but we wanted a vote—we wanted to vote CIO or no union at all and they wanted to go into a ballot and vote independent, no union at all, and the CIO.

Q. Well—Were you able to agree?

A. No, sir; we argued around a while and we could not agree and we told him that—tried to settle the matter between ourselves and they would not agree, they would not agree to that.

And Lundy Groves said that they would go up and see what Mr. Wallace said about it, that they could take a vote with the CIO and no union at all, and they wanted their independent union in.

Q. They wanted their independent union in.

A. That was the argument; we didn't want the independent in.

Q. You didn't want to vote with the independent; did you?

A. No.

Q. Then what happened?

[fol. 462] A. They went to see Mr. Wallace.

Q. Do you know where they went?

A. They went to Mr. Davis' house.

Q. How do you know they went there?

A. Went up the street; I saw them go into the house.

Q. Well—Was the meeting resumed after that?

A. Yes, sir.

Q. What was their position after they come back?

A. When they come back their answer was "no," that they would not take a vote with the CIO and no union at all; they wanted their name on the ballot, the independent union.

Q. Did you later agree to that proposition?

A. Yes, sir.

Q. Are you familiar with the charge in the matter that was filed by the CIO?

A. Yes, sir.

Q. Did you assist in preparing the charge?

A. Yes, sir; I checked the cards to find they all belonged to the CIO that was laid off in the 44, 43 or 44.

Q. Did you personally check to see whether all these people listed on the charge were members of the CIO?

A. Yes, sir.

Q. Were they?

A. Yes, sir.

Q. Do you know every one of them personally?

[fol. 463] A. Yes, sir.

Mr. Shroyer: I am talking about the charge that is the subject of this complaint.

By Mr. Shroyer:

Q. Do you know Ansel Smith?

A. Yes, sir.

Q. Is he an employee of The Wallace Company?

A. Yes, sir.

Q. What department does he work in?

A. He works in the tray department.

Q. Did you ever work in the same department there with Mr. Smith?

A. I have worked around and about the same—under the same supervisor or boss.

Q. Are you familiar with Mr. Smith's duties?

A. Yes, sir.

Q. His job?

A. Yes, sir.

[fol. 464] Q. Will you tell us just what he does?

A. Well, he tends lathes and makes trims, butter dishes, and he kind of looks after some of the rest of the plant in the Boss' absence.

Q. Who is the boss you have reference to?

A. McIlwee, Wilbur McIlwee.

Q. What do you mean by "looks after the plant"? Just what does he do?

A. Well, in my work, sometimes he would come down and see how we was getting along or give us orders what to do.

Q. Did he ever give you any orders?

A. Yes, sir.

Q. What kind of orders? What did he ever tell you what to do?

A. Well, when I worked in the log room he would give me orders when to quit, when to bring in logs, if they quit early or something like that tell me what time to quit.

Q. How often would McIlwee be absent?

A. Well, he would be on the job, but sometimes he would be tied up in other departments.

Q. Did McIlwee have more than one department?

A. Yes, sir.

Q. What departments did he have?

A. He has the paper dish and veneer room and the engine room.

[fols. 465-466] Q. Are these departments separated by walls?

A. Wallace?

Q. By walls.

A. Oh, yes; yes.

Q. And are they on different floors?

A. Yes, sir.

Q. Were there any times when you were working in that department when McIlwee was not in the plant?

A. Yes, sir.

Q. How often did that happen?

A. Well, I know of a couple of times. I believe once he was out of town and another time on vacation.

Q. And what did Mr. Smith do during those periods?

A. He just took over and run it, as near as I can say.

Q. Were there any other foremen put in your department there?

A. None other than Smith; he was looking after it as far as I know; he give me orders what to do.

. . . . . .

[fols. 467-468] Cross-examination:

. . . . . .

[fol. 469] Now you spoke of the conference before the strike with Mr. Davis present; didn't you?

A. Yes, sir.

Q. And you said Mr. Farmer and you and some other representative of the CIO were there; is that right?

A. Yes, sir.

Q. And there wasn't any independent union that you knew of at the time; was there?

A. Present at the meeting, you mean; is that what you mean there?

Q. Well—Present at the meeting or either way. Mr. Dodrill, I am not trying to mix you up.

A. Yes, sir; I believe it was.

Q. It was before the strike.

[fol. 470] A. Yes, sir.

Q. Now, then, the question is whether—Was there any independent union in existence at that time, so far as you know?

A. No, sir; I don't believe there was at that time.

Q. Now there wasn't anybody representing the independent union at the meeting.

A. No.

Q. Couldn't be; there was no union at that time.

A. No, sir.

Q. All right.

Now then—Isn't it a fact that you demanded at that meeting—three meetings, of course; wasn't there?

A. Yes.

Q. And isn't it a fact that at those meetings you wanted a card count?

A. Mr. Farmer asked for a card count.

Q. Mr. Farmer asked for a card count.

A. Yes, sir.

Q. And there was various propositions made about how to conduct the card count.

A. That is right.

Q. And the company did not accept any of them; is that it?

A. That is right.

Q. Now between the meetings when that question was up [fols. 471-472] didn't Mr. Davis say that he wanted to consult Mr. Wallace about the matter?

Wasn't that the reason the matter was laid off for a while?

A. I don't remember.

Q. You wouldn't remember about that.

A. No.

Q. Now Mr. Davis—Mr. Davis finally came back on that proposal and said that they wanted a Labor Board election, wasn't that it, to determine whether you had a majority or not?

Isn't that right?

A. Yes. He also offered to count them, turn our cards over to him and Miss Weese and let them count them.

Q. I wanted to ask you about that:

Didn't he say that if there was—if there was a card count he would want the committee that was designated to make the card count to talk to the people?

A. No, sir; he said he would like to talk to them individually.

. . . . . .

[fol. 473] Q. Oh, now, Mr. Davis did make this proposition, though, that he would consent to a National Labor

Relations Board election; didn't he? The company would?

A. In the first meeting we had?

Q. No; no; the last meeting you had before—or the next to the last meeting you had.

A. Mr. Wallace—We met Mr. Wallace personally one time.

Q. Yes; of course, you did; but not this time; did you? In fact, Mr. Wallace, in the meeting—You never saw Mr. Wallace in the meeting before the strike or did you?

A. No, sir; it was after the strike.

Q. Yes. Well—Now I am talking about the first meeting, before the strike. You know that; you understand that; don't you?

A. Yes, sir.

Q. Now I am going to ask you again: Didn't Mr. Davis say at those meetings before the strike that the company would consent to a National Labor Relations Board election [fol. 474] on the question of whether the CIO had a majority or not?

I want you to be fair about it and remember it the best way you can.

A. I believe he did; yes, sir.

Q. Thank you.

A. It wasn't at our first meeting; no.

Q. No; no; I didn't try to tear you down on that date.

Now, then, what was Mr. Farmer's answer to that proposition?

First I will ask you: Did Mr. Farmer answer it right away or didn't he say he would like to consider it and have another meeting? Do you remember about that?

A. I believe he said he would leave it up to the—to the union, the organization.

Q. And come back and tell them the answer?

A. Yes, sir.

Q. All right. Now after that what happened? Didn't he come back and talk to Mr. Davis again?

A. Yes, sir.

Q. And he told him the answer; did he?

A. Yes, sir.

Q. And what was the answer?

A. They voted to take—that they would not have an election at that time.

Q. They would not have an election at that time?

[fol. 475] A. No.

Q. Now Mr. Davis was talking about, "We want a Yes r No election"; wasn't he? He was talking about the ection of the CIO or nothing; wasn't he? And there asn't any other union in existence.

A. I believe that is right, that he was.

Q. Now, Mr. Dodrill, after the strike there were some ore negotiations about an election, were there, with your nion?

A. Yes, sir.

Q. Now you correct me if I am wrong: Wasn't it about he same all the way through, that you folks wanted a card ount and the Wallace people wanted an election? Isn't hat about it, most of the time there?

A. Yes, sir.

Q. Were you present, Mr. Dodrill, as a member of the nion's executive committee or an officer of the union at a eeting that was held with a fellow called Miller from the ational Labor Relations Board down here in Richwood?

A. I was present at two or three meetings; I don't remember Miller.

Q. You don't remember Miller.

A. Yes, sir.

Q. Don't you remember a fellow of that name coming down here and conducting an investigation about company-dominated union some time in October or at the end of

fol. 476] October? After you had been about a month.

A. I remember about sitting in on a meeting but I don't remember whether it was Miller or who it was.

Q. Where did you meet? Do you remember a representative of the Board meeting down here about that time?

A. Yes, sir.

Q. Where did you meet with him?

A. The first meeting we had with Wallace was at his office in Richwood.

Q. There was talk about the Richwood Clothespin & Dish Workers Union at that time; wasn't there? Whether it was a company union or not.

A. I don't remember.

Q. You don't remember.

A. No.

Q. Do you remember——

A. About the company union that time.

Q. What?

A. I don't remember about the independent union at that meeting.

Q. You remember the representative of the Board and I will call him Miller.

I don't confine you to your answer. You don't remember his name but do you remember this representative of the Board saying that he had investigated the independent [fol. 477] union and that he thought it was company-dominated?

A. Yes, sir.

Q. Do you remember him saying that?

A. Yes, sir.

Q. And was there any representative of the independent union there?

A. Yes, sir.

Q. Who was there representing the independent?

A. Carm Reese, Lundy Groves, as well as I remember, and——

Q. And Keene.

A. And Keene; yes, sir.

Q. Was Mr. Ritchie, here, the gentleman sitting here at the table, was he there?

A. I don't remember. I don't believe he was.

Q. Do you know if he was in Richwood at the time?

A. I think he was in Richwood.

Q. Now, was Mr. Webster there?

A. Yes, sir.

Q. Do you remember Mr. Webster asking this man from the National Labor Relations Board if he would not talk to the foremen in the plant?

A. I don't remember.

Q. You don't remember.

A. No.

Q. Did this man from the National Labor Relations [fol. 478-488] Board talk to any of the foremen while you were there?

A. No; I don't believe he did; I don't remember that.

Q. Did he say at the time he was here that he had talked to the CIO and he had concluded that the independent was a company-dominated union?

A. No, sir.

Q. You don't remember him saying that.

A. No, sir.

Q. Don't you remember him saying about the first five minutes of the conference that he had already concluded it was a company-dominated union?

A. No, sir.

Q. Wasn't it earlier in the conference he said that?

A. I don't remember him saying that.

Q. You don't remember him saying that.

A. Not those words. I remember him saying that he come in here after evidence and he had a lot of evidence proving that it was a company-dominated union.

Q. You heard him say that but don't remember him saying it earlier in the meeting.

A. It was during the meeting; I don't remember just what time.

Q. It was during the meeting.

A. Yes, sir.

. . . . . .

[fol. 489] By Mr. Chubb:

Q. Now I want to ask you about one or two members of the C. I. O. union:

. . . . . .

[fol. 490] Q. Was Ira Cruse a member of your union?

A. Yes, sir.

Q. I mean, of course, the C. I. O. You understand.

A. Yes, sir.

Q. Now was Mike Goheen a member of your union?

A. Yes, sir.

Q. Was Orville Smith a member of the C. I. O. union?

A. Yes, sir.

Q. And Kelso Meadows: was he a member?

A. Yes, sir.

. . . . . .

Q. Do you know about the rules of your union, that is, the C. I. O. union, as to eligibility for membership?

A. Yes, sir.

Q. Was anybody who was a boss or a foreman or in a supervisory capacity permitted to be a member of the C. I. O. union under your rules?

A. They could belong but they could not take any active part, I don't think, in the organization.

Q. Now did Mike Goheen take any active part in your union?

(No response.)

Mr. Chubb: I would like the record to show a pause here.

[fol. 491] A. Well, he would hardly ever come to a meeting.

Q. Sir, I didn't understand that.

A. He hardly ever come to a meeting.

Q. Was he an officer of the C. I. O. local?

A. I think he was for a little while.

Q. Do you know what office he held?

A. I couldn't say positive but I believe it was secretary.

Q. Now Ira Cruse: was he active in your union?

A. No, sir; he was a member but he didn't take part in it.

Q. Was he an officer?

A. No, sir.

. . . . . .

[fol. 492] Q. How about Kelso Meadows? Was he active in your union?

A. He was a member.

Q. Well—Now was he active or not? I don't want to pin you down but when I asked you if he was active you could say Yes or No.

A. He was not on any committee.

Q. How?

A. He was not on any committee.

Q. And he was not any officer.

A. No, sir.

Q. Did he go out to get members?

A. Not to my knowledge.

. . . . . .

[fol. 493] Q. Now I want to go back just a minute to this meeting before the strike or these meetings before the strike when you were negotiating about the proof of majority.

Mr. Farmer, you said, was present at those meetings or at least some of them.

A. Yes, sir.

Q. I guess he was there at all of them; wasn't he?

A. Yes, sir.

Trial Examiner Spencer: May I just have who Mr. Farmer is? I don't think he has been identified previously.

Mr. Shroyer: He is an organizer.

Mr. Chubb: I think it is stipulated that Mr. Farmer is one of the organizers of that local, the complainant in this case.

Mr. Shroyer: That is true.

Mr. Chubb: And an officer or a field representative of the U. C. W. O. C.

[fol. 494] Mr. Shroyer: That is correct.

* * * * * * *

Q. Now the last meeting that you had, that is to say, that Mr. Farmer and your committee had, with Mr. Davis before the strike was held the day the strike was called; isn't that right?

The day the men walked out, the same day.

A. As I remember, we had a meeting the day before and we was to go back later.

[fol. 495] Q. Well, see if you remember this: Do you remember Mr. Farmer saying to Mr. Davis at that last meeting that you would agree to a card count or we are calling the men out at 2 o'clock?

Do you remember him saying that?

A. The last meeting we had—We had voted that night—I think we had voted to come out if they would not give us a card count, some way of obtaining recognition.

Q. That was the night before the last meeting; wasn't it?

A. Yes, sir.

Q. And then you met the next day, that is, the day of the strike, with Mr. Davis; right?

A. That is what I can't remember, whether it was the day of the strike or the day before.

Q. Well now I will ask you again: Do you remember Mr. Farmer saying that night, at that last meeting, "If you don't agree to a card count and recognize the C. I. O. we will close the plant down at 2 o'clock"?

A. He told them that that day, that the employees had agreed to do that.

Q. That was the last meeting before the strike.

A. Yes, sir.

Q. And wasn't it the same day of the strike?

A. I can't remember whether it was the day before or the day of the strike.

[fol. 496] Mr. Chubb: All right.

Just a minute.

By Mr. Chubb:

Q. In those same meetings do you remember Mr. Davis saying that he would not agree to a card count because some of the people had come to him and told him that they had made a mistake when they joined the C. I. O.? Do you remember him saying that?

A. He said he wanted to talk to every one of them personally and see whether they wanted to belong to the C. I. O. or not.

Q. Now I didn't ask you that; I asked you if you remembered Mr. Davis saying that some of them had come to him and told him that they made a mistake about the C. I. O.; that they had signed up and they would like to get out or something to that effect?

Now you just answer Yes or No the best that you remember on it.

A. He told us that I believe one or two maybe had come to the office and said that they had made a mistake when they joined up with the C. I. O.

Q. Now you started organizing—I think that you said that you joined the C. I. O. in July.

A. Yes, sir.

Q. Had you done organizing there from July through August up to the end of September, when those conferences were held? Right?

[fol. 497] A. Yes, sir.

[fol. 498] Q. You referred to a conversation with Sisco Gibson, I believe. You say that he had asked you whether you had joined up with the C. I. O. or not; is that right?

A. Yes, sir.

Q. And whether you had asked anybody else to join up or not; is that right?

A. He asked me how we was getting along organizing or if we had organized, if anybody joined up.

Q. If you asked? But now let's get this straight. I thought he asked you how you were getting along with the organization.

Or whether you were organizing? Is that what, in substance, what he asked you?

A. Well, I had different conversations, different talks, [fol. 499] with him at different times.

One particular time he asked me if I had joined up; yes, sir.

Q. Well, when was it? Was that the same time he asked you how you were getting along organizing?

A. As well as I remember, it was.

Q. Well, if he asked you how you were getting along organizing he meant your union that you were organizing there; did he not?

A. I guess he was just trying to find out all he could, I guess, about the organization.

Q. How long had you been organizing before you had this conversation with him?

A. Oh, maybe a week.

Q. Did he ask you to stop organizing?

A. He didn't — me to stop; he told me that Mr. Wallace said he would never recognize the union.

Q. Wallace said he would never recognize it.

A. Recognize the C. I. O.

Q. Well, did he tell you that Wallace had personally told him that?

A. Yes; he said he told them in the meeting.

Q. He said who had told him in the meeting?

A. Wallace.

Q. Did he tell you what meeting it was?

[fol. 500] A. He said a meeting they had at the office, the office at the factory, I suppose.

Q. Now let's see. Sisco Gibson told your that Wallace had told him at a meeting they had at the plant office that they would not recognize the C. I. O.; is that correct?

A. Yes, sir.

Q. Is that all he said to you?

A. Oh, no; we talked about it a lot ~~of times; he didn't~~ say personally that he cared whether we organized or not; he was just telling what Wallace had said.

Q. So far as he was personally concerned he never indicated whether he favored the C. I. O. or whether he was against it; did he?

A. No, sir.

Q. Made no objection whatever to it himself so far as he was concerned.

A. No, sir.

Q. Now where was it that McIlwee told you that if you did not quit getting signers for the C. I. O. that you would all be out of a job or words to that effect?

A. In the entrance to the machine shop, door into the machine shop, power plant, whatever you want to call it.

Q. Now I want to ask you, just when did that occur?

A. Well, it was the latter part of July, along just a little while after we started to organize; I don't just remember [fol. 501] what day but I know we had been organizing and had cards signed up.

Q. Well, now, who was present in that conversation?

A. As well as I remember there was another fellow there.

Q. What was his name?

A. Two or three around about there but I don't know whether they heard it or not.

. . . . . .

Q. Well, did Mr. McIlwee make any explanation to you of what he meant by that statement?

A. He just told us that you all will be out of a job if we didn't quit organizing there.

Q. Did he explain why you would be out of a job?

A. He said Wallace would not recognize the C. I. O. and warned us.

Q. Would not recognize the C. I. O.

[fol. 502] A. Yes, sir.

Q. Did he say Wallace told him that?

A. He said Wallace said—I don't know.

Q. He would not recognize the C. I. O.

A. Yes, sir.

Q. Was it that statement that caused you to assume that he said that if you didn't stop organizing you all would be out of a job?

A. I don't quite understand.

Q. Was that the statement which he made and which you interpreted to mean that you would be out of a job?

A. That is just what he told me. I don't—That is what he told me.

Q. He did not tell you not to join the C. I. O.; did he?

A. He told me—Someone told me I would be out of a job if I didn't quit organizing.

Q. Well, that doesn't answer my question. Did he tell you that he was personally opposed to your joining the C. I. O. or working for the C. I. O.?

A. I have heard him make a statement to a bunch that was leaving the factory one evening before the organizer come in there; it was passed around through the plant that there was going to be a C. I. O. meeting in the plant and he told us to go down and oppose it.

Q. Told whom to go down and oppose it?

[fol. 503] A. Told the bunch. I was in the bunch.

Q. That was before the organizing ever started.

A. Yes, sir.

Q. Who was present when he told you that?

A. I was, for one; I don't remember who the rest of them were.

Q. And he told you to go down and oppose whatever the C. I. O. was holding; is that right?

A. He didn't tell me; he just told the group and I heard it; he wasn't personally talking to me.

Q. Well, did he yell it out so everybody could hear it?

A. Yes, sir; told us plain.

Q. Well, now, just tell us again what he said.

A. He said that the C. I. O. was calling a meeting in the town that night to try to organize the plant; told us, "You had better go down and oppose it"; and "Mr. Wallace said he would never recognize the union; he would shut the plant down and move it away."

Q. Mr. Wallace said he would never recognize the C. I. O., that he would shit the plant down and move it away.

A. Yes, sir, before he would recognize the C. I. O. That was said so everybody could hear it; everybody could hear it in that group.

Q. Yes.

A. I heard it plain.

[fol. 504] Q. About what was the date of that occurrence? Do you know that?

A. Well, it was the first part of July; it might have been the last of June; it was just about a week or so before they had the open meeting at the high-school building.

Q. Now, you also stated that Mr. White asked you how you were getting along with your organization; when did that happen?

A. In July some time.

Q. Where did that—Where did that happen?

A. Well, different times——

Q. Different times? Well, let's get this straight. What did he say?

A. Well, he come over every little bit asking how we were getting along.

By Mr. Ritchie:

Q. Now, Mr. Dodrill, did Mr. White ever tell you that he was personally opposed to the C. I. O. and didn't want you to work for it?

A. Yes; he has told me that; he would try to discourage me in every way he could to keep me from organizing.

Q. Well, how would he do that?

[fol. 505] A. Well, by telling me we would be out of a job, and jobs would be hard to get, and Wallace would never recognize the CIO.

Q. Well, Wallace would never recognize the CIO, and as a result of that you would be out of a job; is that it?

A. Well?

Q. Where did he tell you that?

A. All over the job. I worked in the machine shop and wherever I would be.

Q. Every time he would see you?

A. Well, practically every time. He did not always talk about the CIO, but something about it; he didn't tell me that every time he seen me but I do remember at one time him telling me that.

Q. Well now just tell us where that was and who was present there.

A. I don't believe anybody was present.

Q. Where was it?

A. As well as I remember, it was in the machineshop.

Q. And just what did he tell you?

A. Well, he told me that I oughtn't to try to organize.

Q. How is that? What did he tell you?

A. He told me that if I did go ahead and organize and Wallace would not recognize the union that we would all be out of a job, he would shut the plant down and move it [fols. 506-530] away, that they wasn't making any money.

Q. That is one time that he told you that and I understood you said there was more than one time when he told you that; now what was the next time?

A. As well as I remember,—I talked so many times I don't remember; I don't believe he told me all the same time; we just talked about it.

Q. Have you narrowed it down to one time he did make that one statement?

A. I remember that one day he did tell me that.

Q. You don't remember any other time that he told you that; do you?

A. No, sir; not the same statement.

Q. Well, your statement a while ago that he told you that every time he saw you wasn't correct; was it?

A. No, sir.

. . . . . .

[fols. 531-533] Q. Don't argue with me. You did call a strike and they did lose their jobs, didn't they?

A. We didn't call the strike, the people that joined up, they voted to strike, the CIO didn't call the strike.

Q. And when the strike was called, the people left their jobs?

A. Yes, sir.

. . . . . .

[fol. 534] MOTION TO DISMISS

Mr. Chubb: We would like, of course, to renew our motion to dismiss at the close of the Board's case with an opportunity to be heard on that motion.

Trial Examiner Spencer: Well, Mr. Chubb, this is the same motion, I take it, that you made at the beginning of the hearing and we had a statement on your motion at that time. Now, do you want to add something to the statement that you made previously? I am sure you do not want to repeat.

Mr. Chubb: Oh no, I do not want to repeat.

[fol. 535] Trial Examiner Spencer: Very well; I will hear you at this time.

MOTION TO STRIKE

Mr. Chubb: I think that there are other motions that I would like to make. From time to time during the proceeding I made motions to strike certain testimony, and I think probably it would be appropriate at this time to move that all of the testimony adduced in the course of the Board's case, except that relating to facts and circumstances following the election, be stricken from the record.

Mr. Shroyer: Do you mean to say after the election, Mr. Chubb? I thought perhaps you meant the other motion was after the settlement agreement.

Mr. Chubb: Let's say after the agreement of February 19th, perhaps would be more appropriate. We will leave the motion in that shape that all of the evidence adduced by the Board in this case be stricken from the record except evidence as to facts and circumstances after the 19th of February, being the date of the settlement agreement.

In commenting on my motion, Mr. Trial Examiner, I might say that I think that the date of the election does have some bearing on the problem of relevance, because any facts and circumstances between the date of the settlement agreement and the date of the election should presumably have been the subject of objection to the election. At least, there was that opportunity on the part of the complainant to [fol. 536] object and bring the matter to the attention of the Board and the presumption seems to me to be that any objections of that kind foreclosed by the certification of the election by the Board. I have not had time to consider this matter very carefully, but it seems reasonable to me to consider that events occurring between the date of the settlement agreement, evidence of events and happenings between the date of the settlement agreement, that is to say, February 19th——

Mr. Ritchie: Perhaps me?

Mr. Chubb: January 19th.

Mr. Ritchie: January.

Trial Examiner Spencer: The election was held on the 30th.

Mr. Ritchie: The 30th of January.

Mr. Chubb: And that the events and circumstances occurring between the date of the settlement agreement, that is to say, January 19th, and the election on January 30th, should be subject to the same motion to strike for the reasons mentioned, and I move that my motion be amended to include such facts and circumstances.

So I am making that motion, if I may, at this point.

May I say that counsel representing the Respondent Thompson and the Intervener may wish to make the same objection.

[fols. 537-547] Mr. Ritchie: Yes. Now may I say that counsel representing Respondent Thompson and the Intervener join in this motion.

Trial Examiner Spencer: The motion is denied at this time; without prejudice to renewal at the close of the case.

Do you have another motions?

Mr. Chubb: That, and the principal motion to dismiss, is all I have.

Trial Examiner Spencer: The principal motion to dismiss is denied with the same observation.

[fols. 548-572] MOTION TO DISMISS

Mr. Ritchie: Well, I think perhaps we should make a motion, if Mr. Chubb's motion does not already cover it, to strike out all of the Government's evidence on the ground that it is insufficient to sustain the charges set forth in the complaint.

Mr. Chubb: And I will join in that motion.

Trial Examiner Spencer: The motion is denied.

[fols. 573-584] ALVA SLEETH

Direct examination.

By Mr. Chubb:

Q. Will you state your full name, please?
A. Alva Sleeth.
Q. Where do you live?
A. I live at Craigsville.
Q. You live at Craigsville?
A. Craigsville.

Q. Where is that from here, or from Richwood, let us say?

A. Why, that would be, it is around 12 miles east of Richwood, I suppose that is what you would call it.

Q. Have you got a farm down there?

A. Yes, sir.

Q. And you are employed; have you a job besides your farm?

A. I am employed at the Steel-Wallace Corporation, The Wallace Corporation, it is now.

Q. How long have you been employed there?

A. Be 30 years, the 4th of this last March.

. . . . . .

[fol. 585] By Mr. Shroyer:

Q. Do you understand what I meant?

A. Well, what was it?

Q. Before that meeting had you or any of the foremen in any way favored the union?

A. No, sir.

Q. Or been against the union?

A. No, sir, I had not.

Q. Well, what was the occasion then for him telling you to be neutral?

A. For telling us to be neutral?

Q. Yes.

A. For us not to take no part in the organization either way as we was foremen and part of the organization.

Q. Now, is this the only time it came up at a foremen's meeting?

A. No, sir; he told us then that he would read us some more at another time, and he did, in regard to it.

Q. And he read you from the Wagner Act?

A. Read from the Wagner Act; he had a copy.

Q. And this other time that you are talking about, he just [fols. 586-587] read from the Wagner Act aagin.

A. How is that?

Q. This second time he talked about it he just read from the Wagner Act again.

A. Well, he told us to stay neutral all the time and he read some more of the Wagner Act and told us how it was and all about it.

Q. And this is the only two times it ever came up at a foremen's meeting.

A. Well, it was mentioned several times for us to stay neutral; I don't know how many times; I couldn't say.

Q. Well, was there some talk there at the beginning about the fact that there was an organization attempting to organize the plant? Was that brought up?

A. Well, everybody knew that they was a-organizing the plant; that was——

Q. Well, I am talking about the time in the foremen's meetings.

A. Yes; we talked about it in the foremen's meetings; that is how in a way is how it come up; he told us to stay out of it.

. . . . . .

[fols. 588-589] Q. As a general thing are there carloads of logs standing out there?

A. Generally always a carload or two, two sometimes, but sometimes the track is empty if they have got them all dumped into the pond.

Q. Would it be an unusual occurrence to move a carload of logs out of the yards?

A. Yes; if they are not scaled they move them out once in a while.

Q. If the logs are not scaled they move them out once in a while.

I do not understand what you mean.

A. Well, they buy them off the lumber company and if the logs are not scaled they sometimes pull them out from the yard, from the pond.

Q. Would they ever take them out after they are scaled?

A. Sometimes they take them to the mill and saw them up and sometimes they set them out and put other logs in.

. . . . . .

[fols. 590-591] Redirect examination.

. . . . . .

[fol. 592] Mr. Chubb: Now, Mr. Trial Examiner, this is a letter that was sent, as we contend, to all the foremen; I would like, if I may, to identify one copy and then I can use it with each of them:

Mr. Reporter, will you mark this? That will be our exhibit 11.

Trial Examiner Spencer: I am just wondering if the Board's attorney would stipulate with you that this letter was sent to the foremen to avoid the taking of testimony, Mr. Shroyer?

[fol. 593] Mr. Shroyer: Yes; we will so stipulate.

Mr. Chubb: I am offering this as respondent's exhibit No. 11, a copy of a letter which was sent, and identified by the witness as having been sent to him, the only difference being this is directed "Dear Mr. Sleeth" instead of "Gentlemen."

As I understand it, it is stipulated and agreed by the parties that a copy of our exhibit No. 11 was mailed to the foremen in the plant as follows:

C. E. Gibson, Harry White, S. J. Gibson, Alva Sleeth, Wilbur McIlwee, and B. H. Meadows.

Mr. Shroyer: No objection.

Mr. Chubb:

Q. Mr. S. J. Gibson: is he referred to generally as Sisco Gibson?

A. Sisco Gibson, S. J. Gibson.

Q. And the other Gibson, C. E. Gibson, is Clark Gibson: is that right?

A. Yes, sir.

Q. By the way, this list, C. E. Gibson, Harry White, S. J. Gibson, Alva Sleeth, Wilbur McIlwee, and B. H. Meadows: do you want to state whether those are the people that went to the foremen's meetings that you have referred to?

A. Yes, sir.

Q. I don't remember whether the list is identical or not, Mr. Examiner.

[fols. 594-595] Trial Examiner Spencer: Not identical; I don't believe Meadows—the witness did not give the name Meadows, Mr. Meadows.

By Trial Examiner Spencer:

Q. To make the correction; did you name Meadows?

A. To make the correction there, at the time of this, why Clyde Husk was the shipping clerk and he quit and Meadows filled his place.

By Mr. Chubb:

Q. In other words, that is something that happened between the foremen's meetings that were held at about the time the strike began and the time these letters were sent out.

A. Yes.

Q. Is that correct, Mr. Sleeth?

A. That is correct.

(The document above referred to was thereupon marked Respondent Wallace Exhibit 11 and was received in evidence.)

. . . . . .

[fol. 596] HARRY WHITE.

. . . . . .

Direct examination.

By Mr. Chubb:

Q. State your name, please, Mr. White.

A. Harry White.

Q. Where do you live?

A. Richwood.

Q. You work for The Wallace Corporation.

A. Yes, sir.

Q. Where do you work there for them?

A. Sawroom.

. . . . . .

[fols. 597-598] A. Picking strips.

Q. And how long have you been a foreman down there?

. . . . . .

A. Yes, sir.

Q. Now just briefly what is that department, that millroom? What does it do?

A. It cust the logs into the stock that is used there in the various departments.

Q. Does your department include the pond, as they call it there?

A. Yes, sir.

. . . . . .

[fol. 599] Q. Now do you have anything to do with the fellow in the rattler room?

A. Yes, sir.

Q. Is he under you?

A. He is under me.

Q. Now there has been some talk here about an oiler; is there an oiler in your room?

A. Yes, sir.

Q. Is he under you?

A. Yes, sir.

Q. And do you have any night shift down there in your department?

A. Yes, sir.

Q. Now?

A. We do at the present time; yes, sir.

Q. And what do you do about the night shift? Do you get down to the night shift?

A. Yes, sir.

Q. Do you stay all the time?

[fol. 600] A. No; I don't stay all the night; I generally stay until 9 or 10 or 10:30 and if they are having trouble I stay after that.

Q. Well, who is in charge when you are away?

A. Well, I don't have no foreman in charge of it.

Q. You don't.

A. No. Just the oiler; he takes care of it.

Q. Do you leave orders with the oiler?

A. When I go I give him orders what to cut, when to start the saws up for the next day.

Q. And does the oiler ever tell the fellows? Ever hire or fire people?

A. No, sir.

Q. Does the oiler—Supposing that something happens down there and you aren't there, somebody loafs on the job or something like that; does the oiler tell them what to do?

A. No; he doesn't have the authority to tell them; he tells me the next day.

Q. He tells you the next day.

A. Yes.

Q. Now suppose something goes wrong down there; what does he do then?

A. Well, if there is anything outside of a small bolt breaking or a feeder breaking he fixes it but if there is anything other than that that he can't fix he comes after me.

[fol. 601] Q. What were you doing in there before you were a foreman?

A. Oiler.

Q. You were oiling.

A. Yes, sir.

Q. Now how are you paid? By the week or hour?

A. By the week.

Q. And do you know how the oiler is paid?

A. He is paid by the hour.

Q. Is there any piecework in your department?

A. No, sir.

Q. Did you when you were promoted to foreman you say a year ago last April—Did you get a raise in pay?

A. Yes, sir; I was put on a salary.

Q. Do you get paid anything extra for the night shift?

A. Yes, sir.

Q. So for the night shift you get a little extra.

A. Yes, sir; I always do.

[fol. 602] By Trial Examiner Spencer:

Q. Do you know what wages the oiler receives?

A. 65 cents.

Q. 65 cents an hour.

A. Yes, sir.

By Mr. Chubb:

Q. Now before the strike—Do you recollect about the time of the strike at the plant over there, Mr. White?

A. Yes, sir; I have it marked down.

Q. Do you know now what—just about when it was?

A. Along the last of September, somewhere around there.

Q. Along there.

Who was your oiler before the strike?

A. Carm Reese.

Q. Carm Reese.

A. Yes, sir.

[fol. 603] Q. And when did he quit being oiler?

A. In March.

Q. Was that after the election was held?

A. Yes, sir.

Q. Now what is Carm Reese doing now? Do you know?
A. Filing saws.
Q. Filing saws.
A. Yes, sir.
Q. Now is the filing room in your department?
A. Yes, sir.
Q. Oh, your department includes the filing room.
A. Yes, sir.
Q. What do they do in that room?
A. File the saws. We take the saws in to them; they file them, grind them, grind the veneer knives, hog knives, band saws.

. . . . . .

[fol. 604] Q. Did you discuss in those meetings at that time the organization at the plant, the union question?
A. Yes.
[fols. 605-606] Q. Did he give you any—Mr. Davis give you any instructions about how to behave?
A. Yes, sir; yes, sir; he did.
Q. How?
A. He did.
Q. What did he tell you?
A. He told us to leave the CIO alone, take no part in it whatever; it didn't concern us.

. . . . . .

[fol. 607] Q. Did anybody ever ask you about joining the union, Mr. White?
A. Yes, sir.
Q. Who?
A. Hez Shaver.
Q. Well, now, Hez Shaver: when did he ask you about joining the union?
A. Before the strike.
Q. What did he say to you?
[fol. 608] A. Well, he come out one morning and said, "They had a meeting last night and decided to charge $25 initiation fee to join."
He said, "I can't pay it." He said, "They said that if I didn't pay it I would have to quit."
He asked me about joining and I told him I didn't give a damn whether he joined or didn't join.

Q. That was Hez Shaver.

A. Hezzie; yes.

Q. What did you tell him?

A. Told him I didn't give a damn whether he joined it or not.

Q. Did anyone else ask you?

A. Huggins.

Q. What did you tell him?

A. I told him the same thing; told him to join if he wanted to and if he didn't want to join not to join, that I was staying neutral.

Q. There has been some talk in here about you having told Hez to join the CIO; did you tell him to join the CIO?

A. No, sir; I didn't tell him to join; I didn't tell him not to join.

Q. You had a conversation with him about it, though; did you?

A. Yes, sir.

[Fol. 609.] Q. Well, following that conversation did you ever go and ask Mr. Davis and Miss Weese about what you should do?

A. I asked Miss Weese; Mr. Davis wasn't here at the time then.

Q. What did you ask her?

A. I asked her what to tell them. I said, "I don't know what to tell them."

Q. What did she say to you?

A. She told me she could not instruct me what to tell them, that that was entirely up to them; if they wanted to join that was their business.

Q. Did she tell you to tell them not to join?

A. No, sir; she didn't.

Q. Or to join?

A. Didn't tell me to join or not to join.

Q. Did she tell you to join?

A. She didn't tell me to join or not to join.

Q. Was this conversation with Miss Weese right after you talked to Hez or after you talked to Jack or the same time there?

A. Well, it was the same day that I talked to Hez; that is right.

Q. The same day that you talked to Hezzie.

A. Yes, sir.

Q. How did you come to ask Miss Weese about it?

[fols. 610-612] A. Well, I was just up a tree; I didn't know what to tell him; I just asked her for her advice.

Q. Do people over there in the plant go to Miss Weese for advice now and then?

A. Well, sometimes if you want to know stuff you ask her if Mr. Davis isn't here.

. . . . . .

[fol. 613] By Mr. Chubb:

Q. Mr. White, you had reference to that notice being the notice that was put on the clock; is that right?

A. Yes, sir.

Q. Who was it you were talking to about that? Was it Hez Shaver?

A. Hez Shaver.

Q. What did you tell him?

A. I told him that was all there was to it; he could read it and understand it.

Q. And did you have any talk with him about quitting or joining the independent?

A. About what?

Q. About quitting or joining the independent union.

A. I told him the notice said every man had to belong to the independent union.

Q. Did you tell him to join?

A. No, sir.

Q. When was that conversation? Do you remember about when it was?

A. Well, it was some time after the notice was put on the clock and the deadline.

Q. The deadline for them to join or——

[fol. 614] A. Yes.

Q. —quit. And what did he say to you, Harry?

A. He said he wouldn't join.

Q. And what did you say then?

A. I told him I didn't give a damn whether he joined it or not.

Q. Now do you recollect some kind of a conversation about that time also with Red Bashaw?

A. That was the night before the deadline, Bashaw.

Q. You talked with Bashaw in your department.

A. Yes, sir.

Q. Is that the same fellow they call Red Bashaw.

A. Red Bashaw.

Q. What does Red Bashaw do in your department?

A. He rolled decks.

Q. Rolled what?

A. Rolled the logs from the big deck saw on towards the bandsaw.

Q. Did he do anything else?

A. Yes, sir.

Q. What could he do?

A. He could saw or he could file.

Q. Did he run the bandsaw ever?

A. Yes; he run a bandsaw.

[fol. 615] Q. How long did he work in there?

A. Well, I don't know exactly how long he did work there; he worked quite a while.

Q. You and he are pretty good friends, get along all right; is that so?

A. Yes, sir; we were good friends.

Q. Did you ever tell him to join the CIO or to join the independent?

A. No, sir.

Q. Did you ever talk to him about it?

A. Yes, sir.

Q. What did you say to him and what did he say to you about it?

A. Well, he told me the boys don't have anything; he says he wasn't going to put his name on that card for no more than the independent union had got. "Well," I told him, "I am sorry but there is the notice on the clock says every man must belong."

Q. Oh, you talked to him about the time this notice was put up.

A. Yes, sir; this was the night before the deadline; yes, sir.

Q. You told him he would have to join, that there were no exceptions; is that it?

A. I didn't tell him he had to join; I told him there was a [fol. 616] deadline; every man that worked had to sign.

Q. What did he say to that?

A. He said he wouldn't sign.

Q. What did you say to that?

A. I said, "It is out of my hands," I was sorry, I didn't have a thing to do with it, it was just up to him entirely what he did.

Q. If I told you that Bashaw said that you said you were sorry to see him quit would you say that was right? Is that right?

A. Yes, sir.

Q. Did you say that?

A. Say that I was sorry to see him quit?

Q. Yes.

A. I told him that a man that didn't have a card would not work the next night. And he didn't sign no card.

Q. Did he come back the next day?

A. Yes, sir.

Q. What did he come back for?

A. To work, I guess. He and Mr. Willison and Ray Tolliver come in.

Q. What did you tell them?

A. I told them the jobs was filled and told them all they had to do was to qualify in the independent union and they [fol. 617] could go to work.

Q. Did you tell them that they were fired?

A. No, sir.

Q. You said Willison was working, too.

A. Yes, sir.

Q. Was he a pretty good man?

A. Well, he was kind of stubborn; you had to handle him pretty easy to get along with him.

Q. Do you know whether these men were members of the CIO or not? These three men I have mentioned.

A. They wore their buttons.

Q. They wore their buttons.

A. Yes, sir.

Q. Did you ever tell them not to wear their buttons?

A. No, sir; I did not.

Q. Did you ever tell them not to wear the buttons?

A. No, sir; I was there to get production; it wasn't up to me whether they wore buttons or not.

Q. Do you know a girl called Minnie Givens?

A. Yes, sir.

[fol. 618] Q. Did you have a conversation with Minnie Givens about the CIO?

A. I had a conversation with her or wanted her to come back to work?

Q. All right. Now did you talk to several people about coming back to work?

A. I did.

Q. Now tell about that. Just what were the circumstances? Will you just tell the examiner?

A. Well, I just asked them if they wanted to come back to work, is all.

Q. Whom did you talk to?

A. Harold Harris, Harris Boyle, Minnie Givens, Pauline Green, several of them.

Q. Was that when the strike was on?

A. Yes, sir.

Q. Were you instructed or asked to go out and get people back to work?

A. Yes, sir; told them, "Everybody come back and go to work; nobody barred."

Q. Did you tell them anything about the union at that time?

A. No, sir.

Q. Did you ask any of them to join the independent?

A. No, sir; I didn't ask a man.

[fol. 619] Q. Or a woman.

A. Or a woman; nobody.

Q. Now did you say you did talk to Minnie Givens about that?

A. I did.

Q. Harry, what did you say to Minnie Givens about it?

A. I asked her if she wanted to go back to work.

Q. Where were you when you talked to her?

A. In front of her house. I was on a bicycle.

Q. Harry, do you remember that occasion pretty well?

A. Yes, sir.

Q. Tell us what took place. Tell us what the conversation was, would you, please?

A. I asked her if she was interested in going back to work. She said, Yes, she would like to go to work.

. . . . . .

[fol. 620] Q. Well, now, Harry, did you talk to Minnie Givens about cards, union cards, or CIO cards, or cards to go back to work and cards to break through the picket line or any kind of cards?

A. No, sir; no, sir; not at that time.

Q. Did you talk to her about that at any other time?

A. Well, along about Christmastime she was asking me, she got a card through the mail.

Q. What was on it?

A. She got a card through the mail.

Q. What was on that card? Do you remember?

A. Well, it was voting whether to go back to work or not. I didn't read the card; I just saw the card but I didn't read it.

Q. You didn't have one in your hand.

A. No, sir; I did not.

[fol. 621] Q. Where did you see the card?

A. Over on the street.

Q. You saw some of these cards.

A. I saw some of these cards but I never did read one of them; I don't know what it said.

Q. When did you talk to Minnie about that?

A. Oh, about Christmas time, right in the neighborhood of Christmas.

Q. What was it? Just a casual conversation?

A. Just a casual conversation; yes, sir.

Q. Well, was it something about getting people back to work on it?

A. I didn't read it.

Q. Well, was it just before they were trying to reopen the plant and get the people to come to work?

A. Before they got the cards?

Q. Yes.

A. Well, I don't remember the date that we tried to go in. We made an attempt to go in and was stopped at the gate.

Q. Whom were you stopped by?

A. By the CIO, about 50, 75 of them.

By Mr. Shroyer:

Q. At the gate?

A. Yes, sir.

Maybe more.

By Mr. Chubb:

Q. Was there trouble?

[fols. 622-623] A. I think there was a couple of little fights didn't amount to much.

Mr. Chubb: Whatever happened to our card? Do you remember?

Well, here is a card that has been marked respondent's exhibit No. 4.

By Mr. Chubb:

Q. I ask you if you can identify that for us.

A. No, sir; I never saw that card before, none like it; no, sir.

Q. Never saw that before.

A. Never saw no card like that.

Q. Was it a card like this that you say on the street over there?

A. People were opening up their mail and had cards in their hands; I never read the card; never read it.

Q. You just heard them talk about cards.

A. Yes, sir; never read them to know about them. About Christmastime there was discussion all over town.

Q. When you would talk to folks about coming back to work did you say anything about unions?

I didn't quite get that quite clear.

A. No, sir; we were sent out with instructions every man to go back to his job that wanted to go back; we was trying to get the plant opened up.

[fol. 624] Q. Around about the time of the election did you have occasion to notice the condition of the cars on the track, whether they were there or loaded or unloaded?

A. Well, there was cars on the track the day before; whether the Cherry River engine pulled them out I don't know.

Q. Did you have anything to do with it?

A. Not a thing; the logs is not our property until they are scaled and then we unload them.

Q. Until they are scaled and unloaded you do not have anything to do with them.

A. No, sir.

Q. Until they are scaled you do not handle them.

A. No, sir. When we need logs we send for the scaler and he comes down and scales them and then when we need them we dump them out.

We have dumped off the car into the pond. They ask us to dump them.

Q. Do they ever haul them away?

A. After they are scaled?

Q. Do they ever move the cars of logs in on the different tracks?

[fol. 625] A. Yes.

Q. They do move them around.

A. Yes, sir.

Q. Who does that?

A. Well, the train comes up from the river or down on the river; the Baltimore & Ohio. They shift them in on the siding and next day the switch engine comes in and gets them and takes them up to the mill.

Trial Examiner Spencer: Well—May we have a little clarification on that?

By Mr. Chubb:

Q. Who do you mean by "they"?

By Trial Examiner Spencer:

Q. You refer to "they" in connection with the moving.

A. Oh, the Cherry River Company.

Q. What is that? The Cherry River Boom & Lumber Company?

A. They shift the logs. When we need logs they shift the cars; they take the empties out and spot the loads in.

By Mr. Chubb:

Q. Mr. White, the company buys the logs from the Cherry River Company; is that it?

A. Yes, sir.

Q. Do you know about these tracks? Are they our tracks?

A. No, sir.

Q. Or are they the property of the Cherry River Company?

A. They are the Cherry River Company tracks; they keep them up, I guess. I never did ask anybody whether they belonged to The Wallace Corporation or not but when [fol. 626] they need any new ties or repairs the Cherry River Company repairs them.

Q. They run them in there on the track that tilts the cars; don't they.

A. Yes, sir.

Q. They tilt them and they roll into the pond.

A. They tilt the springs and they run in the pond.

Q. Have you ever seen the Cherry River people take out loaded cars, other cars that are loaded with logs?

A. Yes, sir; they take loaded cars; I seen it several times.

Q. Do you know whether the cars were pulled out on the day of the election or the day before the election?

A. I think they was; they was; yes, sir.

Q. Did anybody comment about that to you?

A. Well, I don't know whether they did or not.

Q. Did you ever say to anybody that "there you are; there will be no more logs"?

A. No, sir.

Q. Did you ever say there would be no more logs if the CIO won?

A. No, sir.

[fol. 627] Q. Now did you have any conversation with Hez Shaver about the picket line?

[fol. 628] A. Just about going back to work.

Q. Just about going back to work.

A. Uh-huh.

He said he didn't want to try unless he was sure he got in.

He said the CIO was giving him commodities; he said if he tried to go back in and didn't get back in they would cut out his commodities.

They paid his light bill. He said he was afraid to go in. He said they had another shooting scrape at that time. He said, "I am afraid to go in."

Q. Who had another shooting scrape?

A. He didn't say; he said "they"; that is all that he told me.

Q. When he said "they" whom did you think he meant?

A. Well, who else would I think he meant but the CIO?

[fols. 629-639] Q. Was he a CIO member?

A. He was.

Q. Did you know that at the time?

A. Yes, sir, he followed me out on the walk. I talked to him in the house, and he followed me out on the walk and

told me this, He said, "As soon as this snow goes off——"

Q. What did he tell you, Harry?

A. That is all he said. He said, "I am afraid to go back in."

Then he said, "If we try to go in and don't get in, they might eat my commodities off"; he said, "What will I do," he said, "I have got a big family."

Q. As soon as the snow goes off.

A. He said they had another shooting scrape planned—as soon as the snow goes off.

Q. What did the snow have to do with the shooting scrape?

A. Well, I don't know. That is all he told me. He said they had another shooting scrape planned up as soon as the snow goes off. There was a skiff of snow on at the time.

. . . . . .

[fol. 640] Cross-examination.

. . . . . .

[fol. 641] By Mr. Shroyer:

Q. I think you testified that if there was any loafing on the job the oiler would tell you about it the next morning.

A. He would tell me, he would report to me the next morning.

Q. Does he report to you every morning?

A. No, sir. The night man goes off, and if there is a breakdown he leaves a note for me.

Q. That shift does not overlap the day shift, does it?

A. No, he quits at 1:30 in the morning.

Q. If you found anything wrong when you came on in the morning, who would you inquire of about it?

[fol. 642] A. There would be nobody.

Q. From the oiler?

A. From the oiler? I leave instructions, I tell him if anything breaks down to leave me a note; and I get it when I come in, and fix it, or I may have some other fellow fix it before work commences.

Q. It was always the oiler, though, that would report to you?

A. Yes, sir.

Q. Leaving a note for you, and if he didn't you wouldn't know anything about it?

A. I instructed him to do it.

Q. If something should go wrong and he didn't report it, would you ask him about it then?

A. Well——

Q. Or call him down?

A. It never has happened. I don't know what I might do if it did happen.

Trial Examiner Spencer: Now, you were referring just to the night shift oiler, or are you referring to both the day and night shift?

The Witness: Both.

Trial Examiner Spencer: The same question.

The Witness: I am always there during the daytime and up until 9:00 o'clock at night.

[fol. 643] By Mr Shroyer:

Q. Was Carm Reese on the night shift?

A. Yes, sir.

Q. Have there been times, White, when you would be gone for a day or so?

A. I never have been gone. Today is the first day I have been off the job since I took the job, and I gave my oiler instructions what to do.

Q. Well, then, when you are not there he is responsible for what goes on?

A. No, he is not responsible.

Q. You said you gave him instructions what to do.

A. I gave him orders what to cut, but he is not responsible. If a man would quit he could not do anything about it, he could not hire another man to put in his place. If a man would just sit down he could not fire him. I gave him orders what kind of stock to cut.

[fol. 644] By Mr. Shroyer:

Q. How many of these foremen's meetings do you have?

A. Two a week.

Q. How long has that been going on?

A. Since we went back to work.

Q. And before you went back to work, how many did you have?

A. Oh, once in a while we would have one, but for quite a while we wouldn't have any.

Q. They were irregular then?

A. Yes, sir.

Q. Who attended those foremen's meetings?

A. The foremen.

Q. And who else?

A. That is all, Mr. Davis.

Q. Miss Weese?

A. No, not Miss Weese; if there was something she [fol. 645] wanted to talk over with us, she would come in.

Q. Do you remember some occasions when she came in?

A. Yes; she was in there a while back discussing several matters, how we wanted to conduct social security, the best way, wanted her suggestion on it.

Q. Do you remember any other times?

A. Month ago, before the 1st of July, she asked us our instructions about how to fill out our cards, the first of the fiscal year, two times we are supposed to turn our cards in and get a new card Wednesday morning.

Q. I think you testified that you went around to see various men and to get them to come back to work.

A. I did.

Q. Who told you to do that?

A. Mr. Davis told me to see how many of them wanted to come back to work, every man like I say, I didn't discuss no union at all.

Q. There was a rumor around the plant, wasn't there, that if the CIO won the election there would not be any more logs?

A. A rumor?

Q. A story going around the plant.

A. I don't know; I didn't hear it.

Q. You stated, you ~~said it was generally~~ talked.

A. I heard talk in town, after the election. The Inde- [fols. 646-648] pendent men said the mill said they would not supply any more logs.

Q. You say it was talked after the election?

A. Yes.

Q. That is the first time you heard it?

A. Yes. I believe the trainman told it first.

Q. He told you about it then?

A. He did.

Q. What did he tell you?

A. He said they pulled those logs in there under high powered rifles, and they would be damned if the CIO was going to cut them. They brought them in shot full of lead and he would be damned if they were going to get them out, cut them up.

Trial Examiner Spencer: What was his name?

The Witness: Sir?

Trial Examiner Spencer: What was his name?

The Witness: Ern Seward.

Trial Examiner Spencer: Who did he work for?

The Witness: Cherry River. He was conductor on the train.

By Mr. Shroyer:

Q. Did you hear it from anybody else?

A. No, sir.

. . . . . .

[fol. 649] (Witness excused.)

Trial Examiner Spencer: I would like to—Mr. Shroyer at this point, is it the Board's position that—or what is the Board's position conceding arguendo that following the agreement that was entered into between the Respondent Wallace and the Independent certain supervisors then told the employes that they would have to join the Independent or lose their jobs; conceding that those statements were made under those circumstances, is it the Board's position that that would constitute an unfair labor practice?

Mr. Shroyer: Before the Board election?

Trial Examiner Spencer: Will you read back what I said? I might have to clarify it.

(Statement read.)

Mr. Shroyer: Unquestionably, after the agreement.

Mr. Whitehie: What was that?

Trial Examiner Spencer: Under the agreement that I referred to, the contract between the Independent and the Respondent Wallace.

[fols. 650-653] Mr. Shroyer: Oh, the contract.

Trial Examiner Spencer: Yes.

Mr. Shroyer: Yes, because we are claiming that the contract was void in itself and that would be an unfair labor practice.

Trial Examiner Spencer: Very well, I just wanted to get your position.

Mr. Ritchie: May I ask one question?

Trial Alexander Spencer: Yes.

Mr. Ritchie: Do you mean that regardless of how much in good faith representatives of the respondent acted—in other words, if he in good faith thought that the contract was valid and acted according to its terms; if it should later be determined to be invalid, that that would constitute an unfair labor practice? Is that your position?

Mr. Shroyer: Well, of course, that presupposes something that could not be true. It could not be a valid contract if the company dominated the union.

Mr. Ritchie: To go a little further. I think that Exhibit No. 12, the notices that were posted about the provisions of the contract, you would necessarily feel that that was an unfair labor practice, too?

Mr. Shroyer: Oh, yes.

[Tr. 654] STIPULATION

Mr. Chubb: Mr. Trial Examiner, we have just had a conversation about stipulating in order to supply a deficiency in respect to the Respondent Wallace's Exhibit No. 3, which is the agreement for the consent election, and particularly referring to Section 1 thereof which states that "attached hereto and marked Exhibit A is a list of all employes who, all sides agree, constitute a list of eligible voters in the election to be held under this agreement."

As I understand it, it is stipulated and agreed between the parties that the list, Exhibit A, to the agreement, not being in evidence at this time, that the following names appeared on the list attached to the list referred to in the agreement as Exhibit A, namely:

Lundy Groves, Ansel, also known as "Hank" Smith, Carm Reese, Byrne Frame, Mike Gohegn, B. H. Meadows, Ira Crews, Gilbert, also known as "Pug" Dean, and H. Y. Barichman; that of the above named the ballots of three were challenged in the count, the ballot of Lundy Groves and of Carm Reese being challenged by the C. I. O.

Mr. Shroyer: On the grounds that they were supervisors.

Mr. Chubb: On the ground that they were supervisory employes, and the ballot of Mike Goheen was challenged by the Independent on the ground that he was a supervisor; [fols. 655-663] that eventually the challenges were waived and all of the ballots so challenged were included in the count and are reflected in the report in evidence.

Mr. Shroyer: The Board so stipulates.

Mr. Chubb: The Respondent Wallace so stipulates.

Trial Examiner Spencer: Mr. Ritchie, is the stipulation satisfactory to you?

Mr. Ritchie: The statement is satisfactory to counsel for Respondent Thompson and for the Independent.

Mr. Chubb: May I recall Mr. Harry White, Mr. Examiner?

Trial Examiner Spencer: If there is no objection, all right.

Mr. Chubb: Is there any objection?

Mr. Shroyer: No objection.

[fol. 664] MRS. PAULINE GREEN

[fol. 665] Direct examination.

By Mr. Chubb:

Q. Where do you live, Mrs. Green?

A. Richwood.

Q. Married?

A. Yes, sir.

Q. Spell your name, Mrs. Green.

A. G-r-e-e-n.

Q. You work for the Wallace Corporation over there?

A. I do.

Q. Were you working for them at the time of the strike last fall?

A. Yes.

Q. Were you a member of any labor organization at that time?

A. You mean——

Q. At the time of the strike?
A. Yes.
Q. What union did you belong to?
A. The CIO.
Q. The CIO?
A. Yes.
Q. Did you continue to remain in the CIO throughout the strike?
A. I did.
Q. Were you a member of the CIO when you went back [fol. 666] to work in January?
A. Yes.
Q. Did you join the Independent later on, the Richwood Clothespin and Dish Workers' Union?
A. After.
Q. You did?
A. Yes.
Q. When did you join?
A. Directly after the election.
Q. After the election?
A. Yes.
Q. How long after the election, would you know whether it was before or after the agreement was reached between the Independent and the company?
A. It was after the agreement—was it before—well, wait a minute.
Q. Was there a notice—did you know that there was a provision that you had to join the Independent to keep your job?
A. (No response.)
Q. Maybe you do not understand.
A. I believe the notices said that it was agreed that whichever union becomes the bargaining agent, all employes were to be members of that union.
Q. Well, now, was it after that that you joined the Independent?
[fol. 667] A. Yes.
Q. Were you ever asked by anybody down there connected with the company, let's say, any of the bosses, to join the Independent?
A. No.
Q. Do you know Mrs. Givens?
A. Yes.

Q. Do you live near her?
A. Right beside of her.
Q. Do you know Harry White, the foreman?
A. Yes.
Q. Do you recollect an occasion, I think it must have been out near your house, when Mr. White stopped and talked to you?
A. He didn't at my house.
Q. Where was it?
A. Over at Givens.
Q. Givens; it was near your house then, wasn't it?
A. Yes.
Q. When was that, during the strike or after that?
A. It was while we were still on the strike.
Q. Do you recollect the conversation at all?
A. Well, there was, it was just a mixed conversation. We were really discussing a little bit of everything.
Q. Was anything said about the company or the union [fol. 668] situation, or anything of that sort?
A. Well, we discussed it a little, but not in detail.
Q. Do you remember what Harry said, what he talked about?
A. Well, Harry said that he was getting tired loafing and Minnie and I said we were, too, but there was nothing we could do about it, we didn't suppose, and Harry said, "Well," he said, "I don't give a damn what union they belong to," he said, "I would like to see them get this thing settled and all of us get back to work."
Q. Did he say any more definite than that about going back to work?
A. No.
Q. Did he say anything about union cards or signing cards of any kind?
A. He did not.
Q. Were you an officer of the union?
A. No.
Q. Did you attend a good many of its meetings?
A. After the strike I attended practically all of them.
Q. Did you attend a meeting prior to the time that you all went back to work in January?
A. The night before we went back?
Q. Well, I don't know just when, any time in there, do you remember a meeting before you went back to work?

A. (No response.)

[fol. 669] Q. What I was getting at; if I may lead the witness, Mr. Shroyer, a meeting that considered the question of going back to work and the terms of going back to work.

Mr. Shroyer: What do you mean, union meeting?

Mr. Chubb: Yes, union meeting.

Mr. Shroyer: I think that is what is bothering the witness.

Mr. Chubb:

Q. Yes, union meeting.

A. Yes, I think it was discussed in practically all of our meetings, about going back to work.

Q. Did they discuss a closed shop clause?

A. Yes.

Q. Did they vote in favor of the closed shop clause?

A. Yes.

Q. That is the CIO union?

A. Yes.

Q. Do you know when you put in your application to the Independent?

A. I don't know the date I signed the card, but I was voted in on the last Friday before the—that, is, the last Friday in the regular meeting before the ten days was up.

Q. Did you retain your membership in the CIO?

A. No.

Mr. Chubb: That is all.

Trial Examiner Spencer: Mr. Ritchie?

[fol. 670] Mr. Ritchie: I have no questions.

Trial Examiner Spencer: Mr. Shroyer?

Cross-examination.

By Mr. Shroyer:

Q. You say you live next door to Mrs. Givens?

A. Yes, sir.

Q. Where does Mr. White live?

A. He lives up the Avenue; well, it is in sight of my house.

Q. How did you happen to be in on that conversation in there?

A. We were over at Givens, that is, Mrs. Givens, Minnie and I were talking, and he came down on the bicycle.

Q. Where were you talking?
A. Over on Givens' porch.
Q. On the porch?
A. Yes.
Q. And White came up on a bicycle.
A. Yes.
Q. And where was the conversation held?
A. He was outside the fence and we were inside on the porch.
Q. You were calling back and forth across the yard?
A. Yes, sir, over the fence.
Q. Was there a fence at that time around her house?
[fol. 671] A. Yes, sir.
Q. Has that always been?
A. Always been.
Q. Is it there now?
A. Sure.
Q. I don't remember it myself. Who started the conversation?
A. Well, we were talking when he came down, and I don't know, he just drifted in somewhere. I don't know just what his first words were. I believe we were discussing the foot bridge and talking about laying some new boards on it and nailing them down.
Q. Did he ask you if you wanted to go back to work?
A. No, not in just that way. He said, "Boys, I would like to get back to work."
Q. Did he ever ask you if you wanted to go back?
A. No, he didn't.
Q. Mr. White testified that he went around and asked several people to go back to work, but you maintain that he did not ask you to?
A. He did not.
Q. Now, these meetings in which Mr. Chubb asked you about, do you remember whether or not the term closed shop" or "union shop" was used?
A. Well, I believe it was referred to as a closed shop.
[fol. 672-674] Q. Could it have been union shop?
A. I am not positive.

Mr. Shroyer: That is all.
Trial Examiner Spencer: Any further questions? Mr. Chubb?

Mr. Chubb: I do not know whether it is particularly relevant—were you in favor of the closed shop?

The Witness: Yes.

Mr. Chubb: Are you still in favor of it?

The Witness: I am.

Trial Examiner Spencer: Mr. Ritchie?

Mr. Ritchie: No questions.

Trial Examiner Spencer: The witness is excused.

* * * * * * *

[fol. 675] A. F. DAVIS.

Direct examination.

By Mr. Chubb:

Q. You live at Richwood, Mr. Davis?

A. Yes, sir.

Q. How long have you lived there?

A. Seven and a half years.

Q. How long have you been connected with The Wallace Corporation?

A. The Wallace Corporation in Richwood, seven and a half years.

Q. Prior to that time, where were you connected?

A. With the Steele-Wallace Company in St. Louis.

Q. That is the same firm?

A. Same firm.

Q. How long have you been connected with them?

A. About 18 years.

Q. What is your position with The Wallace Corporation at this time?

A. Plant manager.

* * * * * * *

[fol. 676] Q. Mr. Davis, do you recollect the negotiations which took place with the CIO representatives last fall just prior to the strike?

A. I do.

Q. You met at that time Mr. Farmer, who is sitting here with you?

A. I did.

Do you recollect a meeting that was held on the 22nd of September?

[fol. 677] A. I do.

Q. Can you tell the Examiner, were there other meetings following that?

A. There were.

Q. What was the day of the strike?

A. 21st of September.

Q. Can you recollect in any detail the negotiations that took place at those meetings just prior to the strike?

A. Yes, I remember several of the details.

[fol. 678] Q. What was the subject of the first meeting, September 22, the subject of discussion?

A. The principal subject of the discussion was recognition of the CIO union.

Q. And what was the position that you took at that time?

A. I wanted very much to have a secret ballot of all employes, whether they wished to belong to the union or not.

[fol. 679] By Mr. Chubb:

Q. What was Mr. Farmer's position, briefly, at that time?

A. That he wished us to accept their count of the cards.

Q. What was the result of the meeting, if any?

A. Oh, several proposals were made as to how we could arrive at a settlement for determining the majority, several proposals were made.

Q. Do you recollect whether the proposal was made that you and Miss Weese would interview the people and check the cards at that meeting?

A. I believe that proposal included a committee which might include one or both of us, but it was a committee that was to be selected by ourselves and the CIO group to interview employes, if they did not care to have the vote. We preferred to have a vote on it.

Q. Well, did you make that as a proposal?

A. Yes.

Q. I mean the committee's proposal?

[fol. 680] A. Yes.

Q. And was it accepted?

A. No.

Q. Then what was the next thing that occurred?

A. The second—I believe it was the 23rd or 24th, let's see, 22nd or 23rd was the next one.

Q. Do you remember what the proposal at that meeting was?

A. No; but the discussion was similar to the first meeting.

Q. Then the final meeting, when did that take place?

A. On the morning of the 25th, or at noontime, I believe, 12:00 o'clock on the 25th.

Q. And did that meeting—if that meeting, what was Mr. Farmer's position—that was the final meeting before the strike, wasn't it?

A. Yes, sir.

Q. What was Mr. Farmer's position? Just state it briefly.

A. That he informed me that he was going to close the plant at 2:00 o'clock that day.

Q. Were there any conditions on keeping it open? Were there any conditions under which you could keep it open?

A. Well, my recollection is that the meeting the day previous or two days previous, on the 23rd—let's see now—I believe the condition of an election agreement with him at that time was that if we could return Harvey Dodrill [fols. 681-682] with back pay to the job he was laid off from, the one that he had been laid off from just previous to that, that they could consent to an election.

Q. Did you accept that proposition?

A. No, sir.

Q. Did you make a counter-proposal?

A. Well, we insisted right from the start that we get an expression from each employe by secret ballot as to their feeling in the matter, whether they preferred to belong to the CIO or no union. We had had several requests from some of them to have their names taken from the CIO roll, and we had no way of doing that.

Q. All right. Now, of course the strike was actually called, wasn't it?

A. Yes, sir.

Q. Did you make any effort after that to settle the strike, do you remember the next meeting you attended?

A. Well, the next meeting, I believe, was in Cincinnati with Mr. Addicks.

Q. Who is Addicks?

A. Mr. Addicks is the Conciliator for the National Labor Relations Board.

Mr. Shroyer: No, I think that it may be stipulated that he is the Conciliator with the Labor Department.

Mr. Chubb: Yes.

[fol. 683] By Mr. Chubb:

Q. You said you received this letter?

A. Yes.

Q. Exhibit No. 13?

A. Yes.

Trial Examiner Spencer: It is a very short letter.

Mr. Chubb: Very short letter. I would like to read it in evidence.

"Charleston, West Virginia,

"October 14, 1941

"The Wallace Corporation, Attention Mr. A. F. Davis, Superintendent, Richwood, West Virginia.

"Ge-tlemen:

"This letter will confirm our previous conferences with you with reference to the conditions now prevailing in your local factory. Being fully qualified in every respect to act as a collective bargaining agent for your employes, we [fol. 684] respectfully request and demand your recognition of this organization as such agency.

"Very truly yours,

"Richwood Clothespin and Dish Workers' Union,

"By Carm Reese, President,

"By Zella Smith, Secretary."

[fol. 685] Q. Now, are you referring to the letter of October the 14th or the letter of November the 3rd?

A. October 13 was about the first that we knew about the formation of this Independent union, the first official notice that we had of it.

Q. When was the first meeting you had with them, approximately? It is not important.

A. Well, it could have been just a little prior to this, I would say it might have been, and possibly was the latter part of October.

Q. Do you have a very definite recollection of the meeting?

A. I do have a recollection of the meeting.

Q. Where was it?

A. In my home.

Q. What was the subject of the meeting?

[fol. 686] A. Oh, just an official notification, in addition to the letter—that they had a union and claimed a majority of our employes.

Q. And who was there?

A. Carm Reese and Lundy Groves, and I am not positive about the woman representative. There was a woman representative.

Q. Were you present at a conference later than that with a representative of the National Labor Relations Board?

A. Later than that?

Q. Yes, somewhere around that time or a little later.

A. Early in November, I believe, we had a conference with the National Labor Relations Board.

Q. With whom?

A. Mr. Russell Miller, I believe, is his name.

Q. Where was that conference?

A. In our office in Richwood.

Q. What was the subject of that conference?

A. Investigation of a company dominated union, I believe, was the subject of it.

Q. Who was there? Briefly.

A. Mr. Wallace, Mr. M. B. Wallace, Jr., that is, Mr. W. P. Christmas.

Q. I suppose there is no objection to stating that Mr. Wallace is president of The Wallace Corporation, and [fol. 687] Mr. Christmas is vice president.

Mr. Shroyer: No objection.

The Witness: Miss Weese, and all of the foremen.

By Mr. Chubb:

Q. All of your foremen?

A. Shall I name them?

Q. No, you need not name them, but all of your foremen?

A. All of our foremen. Mr. Miller, of course, the investigator, Mr. Titler, Mr. Gallagher and Mr. Farmer, and I believe—did I have Titler and Harvey Dodrill? And Jack Griffies were there. My memory is a little bit hazy. I think, I am pretty certain that they were there during the meeting.

Q. Were any representatives of the Richwood Clothespin and Dish Workers' Union there?

A. No, sir.

Q. What took place, very briefly?

A. Well, it was a—Mr. Wallace merely informed Mr. Miller that he had been accused of unfair labor practices and he informed him that he was presenting the foremen to him.

Q. Mr. Wallace to Mr. Miller.

A. The official employes of our company. Mr. Wallace informed Mr. Miller of this fact and turned the meeting over to Mr. Miller for his investigation.

Q. What did Mr. Miller do?

A. Mr. Miller talked a little while and informed us that [fol. 688] he had already completed his investigation, and that he was satisfied that the Independent union was company dominated and that he was going back to Charleston right away.

Q. What did you say or Mr. Wallace, or anybody, representing the company, say about it?

A. We asked if it would not be proper to have the representatives of the Independent union present at the meeting to defend the charges against them, and Mr. Miller didn't think it advisable.

Q. Did he examine the foremen that were there?

A. No, sir; no examination. He made a list of all of their names.

Q. Was he asked to examine the foremen?

A. Yes, sir.

Q. What happened? Did the meeting break up then?

A. Yes, sir.

Trial Examiner Spencer: Did he make any proposal?

The Witness: No, sir.

Trial Examiner Spencer: Relative to the Independent union?

The Witness: No, sir.

By Mr. Chubb:

Q. Did Mr. Miller make a proposal at that time?

A. I recall no proposal.

Q. Yes.

[fol. 689] A. I say, I recall no proposal.

Q. Was there an election discussed?

A. I would not like to say positive if there was or not.

Q. How?

A. I would not like to say positively that there was or not. Now, there was an incident at that meeting, I believe, that has not been mentioned, but in regard to an election. The proposal by telephone of Mr. Titler prior to this meeting, he had mentioned that they could have an election if we would agree to a closed shop for the CIO, and it was mentioned at this meeting and called to Mr. Titler's attention, and he made the statement that he would have to talk to his people before it could be confirmed.

Q. Was the company's attitude expressed at that meeting?

A. Yes, it was.

Q. What was it?

A. That we would like to have an election; that had always been our desire.

Q. I mean, was the attitude on the closed shop mentioned?

A. We were opposed to the closed shop.

Q. Now, did you make any effort to get your people back to work in December?

A. Yes, sir.

Q. What efforts did you make?

A. About the middle of December, we asked all the [fol. 690] foremen to contact the employes in their vicinity or in their department and get an expression from them as to their willingness to return to work. We had heard lots of stories of hardship, lack of provisions, and it was getting close to Christmas, and we wanted the employes to be working. We had plenty of orders. We wanted to be working. So we did make an effort.

Q. Do you know anything about what was said to the foremen about the union affiliation of the people that they saw?

A. We asked them not to discuss it with the employes.

Q. Were they instructed to contact any particular employes or all employes?

A. No, all employes.

Q. Can you explain why it was that in some cases apparently the foremen interviewed employes who were not in their department?

A. That could be possible, because the foremen are scattered all over the town and so are the employes.

Q. Now, what about this card, post card, business? Do you recollect anything about the card?

A. It was shortly after the incident. That was another method we tried to find out how many employes wanted to go back to work.

Q. There has been introduced in evidence one of those cards with the date December 23, 1942, on it. Would you [fols. 691-701] just state where you got that card? And what does that date mean?

A. Well, we decided that we was——

Q. No, no. I am asking you about the specific card that was introduced here, that specific card.

A. That specific card?

Q. Yes.

A. That was taken from the file of cards at the time they were sent out and marked and placed in my file in the office.

Q. And the date, what does that represent?

A. That is the date that the card was mailed out, marked on the card.

Trial Examiner Spencer: Were they all sent through the mails?

The Witness: Yes, sir; to just the employes, not to the foremen.

. . . . . .

[fol. 702] Q. Now, which of these departments have had a night shift for the last six months?

A. The mill, mill room, and the paper dish department.

Q. And the paper dish department?

A. Yes, and the square pin machine in the clothespin department.

Q. Part of the clothespin department?

A. Part of the clothespin department.

Q. Now, then, when you have a night shift, what is the foreman? What does the foreman do? Does he stay right on through the night shift, or what does he do?

A. No, no. Everybody has a certain piece of work to do, there are certain jobs, and they do not need a foreman. They are certain jobs.

Q. Well, now, Mr. Davis, take the mill room. You heard Harry White's testimony about the oiler. Mr. White, as I understood his testimony, said that when he was away at night that he left orders with the oiler. Now, what is your understanding of the authority of the oiler when Mr. White is away?

A. No authority.

Q. He doesn't give orders?

A. No, sir.

Q. Does he have any authority to rebuke or reprimand [fol. 703] A. No, sir.

Q. How?

A. No, sir.

Q. Does he have any authority to fire them?

A. No.

Q. Supposing there is a breakdown, what does he do then?

A. Fixes it, if he can.

Q. If he can't fix it.

A. Get somebody to help him or go home, shut down and go home.

Q. Does he have the right to send them home if he can't fix the machine?

A. Everybody goes home.

Q. What?

A. Everybody goes home if the machine is not working. They can't work, and if they can't work, why, they have to go home.

Q. Do they ever call the foreman if they get into trouble?

A. Yes.

Trial Examiner Spencer: May I inquire if there — any of these persons whose job status is in dispute here involved in this night shift matter besides Carm Reese?

Mr. Chubb: Carm Reese? I don't know. I was going to ask, take them up individually. Would that be a good [fol. 704] idea, take them up individually? Let's confine ourselves to the issues.

By Mr. Chubb:

Q. Let's take up Carm Reese, since the Examiner is interested. Now, at the time of the strike, where did Carm Reese work?

A. In the mill room.

Q. And what was his position, do you know?

A. Oiler.

Q. What was he paid?

A. Wage rate you mean?

Q. Yes, if you know.

A. I can't tell exactly; around 56 cents an hour, somewhere in that vicinity.

Trial Examiner Spencer: I am just wondering if it might be well to get these wages pretty definitely. If you can, consult the accounts and later put them in evidence.

The Witness: Yes, sir.

Mr. Chubb: Mr. Christmas says he thinks he may have it.

Mr. Shroyer: That will clear the matter up. The Board is very definitely claiming that Carm Reese and Lundy Groves and Hank Smith are very definitely supervisors under the terms of the Act.

(Discussion off the record.)

Trial Examiner Spencer: Ask him what his wages were [fol. 705] at the time of the strike when he was employed in the mill room. The witness says he does not remember precisely what his wage was, so I would just like to have that testimony definite.

Mr. Chubb: Well, we would be very glad to furnish it.

Trial Examiner Spencer: It may appear to be immaterial; it may be entirely immaterial, but since we are covering it I would like to get it definite.

Mr. Ritchie: It seems to me that the question of wages is immaterial, but if we go into wages of certain individuals, it seems to me that would almost necessitate going into the wages as a whole.

Trial Examiner Spencer: Well, I think that perhaps, Counsel, you might be right; that is, if you are going to attempt comparison, we would have to have the wages of other departments.

Mr. Ritchie: That is what I say, exactly.

Trial Examiner Spencer: If you recall, I asked about the wages of other employes when Mr. White was on the stand.

Mr. Chubb: We will try to get that schedule with such reasonable limitations as we think cover the question. I take it that it is a comparative wage rather than the absolute wage, isn't it?

Trial Examiner Spencer: Yes, the matter of wage increases might be material.

[fol. 706] By Mr. Chubb:

Q. Now, we were on Carm Reese. He was an oiler. Was he oiler on the day shift or the night shift? There wasn't any night shift before the strike.

A. There wasn't any night shift when we shut down before the strike.

Q. After the strike, where was Carm Reese?

A. He was on the night shift.

Q. What position?

A. Oiler.

Q. How much was he paid?

Trial Examiner Spencer: I don't think you have stated what his position was at the time of the strike. You said he was in the mill room.

The Witness: Oiler in the mill room on days at the time of the strike.

By Mr. Chubb:

Q. What is he doing now?

A. He is saw filing.

Q. Do you know if there is any difference in pay of the saw filer and oiler?

A. Yes, sir.

Q. What?

A. Higher.

Q. What?

A. Higher rate.

Q. He is getting paid more now than he was then?

[fol. 707] A. Yes, sir.

Q. Still hourly rate?

A. Still hourly.

Q. Does he have any authority in the file room to hire and fire?

A. No.

Q. Discipline employes?
A. No.
Q. Does he work outside the filing room?
A. Yes, sir.
Q. What are his duties now?
A. Well, his job is the circular saws principally; he straightens them, cleans them, puts new cutting teeth in them by grinding them or filing them, automatic filers, automatic grinders, he puts the saw in and takes it out, inspects it.
Q. How many men are in the filing room?
A. Two.
[fol. 708] Q. Just he and another man?
A. Yes.
Q. And who is his immediate boss?
A. Mr. White.
Q. Now, before the strike, you say he worked on the day shift as oiler?
A. Yes, sir.
Q. And there was no night shift?
A. No.
Q. And do you know if there was anyone in the department, that is to say, in the mill room, at the time the strike started who was being paid at a higher rate than Carm Reese?
A. Yes, there was.
Q. Who?
A. The sawyer.
Q. Is the sawyer the highest-paid man in the room?
A. With the exception of the filing room; yes, sir.
Q. With the exception of what?
A. Filing room.
Q. Oh, the filing room has the best-paid men in the department?
A. Yes, the filing room is the best-paid job in the department.
Q. The filing room is the best-paid job in the department, you say?
[fols. 709-710] A. Yes.
Q. Now, in the course—and I am covering the period, say a couple of months before the strike and after the return to work, did you have any conferences with Carm Reese about employing people, or employees, or hiring and firing in that department?

A. No.

Q. Did he have anything to say about the department?

A. No.

Q. If you had anything to say about it, who would you go to?

A. Mr. White.

Q. Now, let's see, about the operation of the department, who directs the operation as to production in the mill room?

A. Mr. White.

Q. Well, where does he get his orders?

A. From the office.

. . . . . .

[fol. 711] Q. Now, we have got the question of Lundy Grove, where does Lundy work?

[fol. 712] A. Clothes pin.

Q. Who is he under?

A. Clark Gibson.

Q. What is his job?

A. Set up man.

Q. Machine set up?

A. Machine set up.

Q. That is the same as some of the girls here referred to as lathe man?

A. Sometimes referred to as lathe man.

Q. Some of the girls here said that Lundy Grove and that type of man operate the machines?

A. No, the girls operate the machines.

. . . . . .

Q. The people that feed the machines, operate them, would it be fair to say that Lundy Groves keeps them in operation?

A. Yes, that would be correct.

Q. Getting a little bit leading, Mr. Shroyer, but I am trying to proceed as best I can. Now, about Lundy Groves' pay?

A. Hourly.

Q. Was that true at the time of the strike?

A. Yes, sir.

Q. Did he have the same job at the time of the strike?

[fol. 713] A. Yes, sir.

Q. Just relatively speaking, what are his duties as a machine set up man?

A. Grinding and adjusting cutting knives.

Q. Would he be one of these people who when the machines are operating would have the authority to tell the girl to move from one machine to another?

A. Have authority to tell her?

Q. Yes.

A. He has five machines—he seldom runs more than three or four of them—he might tell her to go to another machine, the girls work on piece work and it is to their advantage to keep working.

Q. What is that?

A. The girls work on piece work, and it is to their advantage to be busy all the time.

Q. Suppose one of their machines gets in a jam, gets into trouble, what would Lundy do?

A. Start up another machine, if there are any blocks for it. Of course, they can't always have blocks.

Q. Do they report that to anybody?

A. Yes, sir, Clark Gibson would know of it immediately.

Q. How about Lundy Groves, the machine set up man?

A. He would know about it, he is right there.

Q. Do you consider that those girls are telling him what [fol. 714] to do?

A. Do I consider that the girls tell Lundy what to do?

Q. Yes!

A. No.

Q. Do they have authority to tell him to repair their machines?

A. Yes, they tell him it is broken down, if he does not happen to know it, or they tell him it is not working proper, and they get him to fix it for them.

Q. I suppose that Lundy Groves is circulating around among the machines, if he seems something wrong, what does he do?

A. That is his job, to fix it.

Q. Does he ever fire a girl?

A. No, sir.

Q. How about the pay, relative pay of these operators in that department, I supopse the foreman is the highest paid?

A. Yes.

Q. Who is the next?

A. The lathe man, set up man.

Q. How many lathe men are there?

A. I think we have five right now.
Q. In that department?
A. Yes, sir.

. . . . . .

[fol. 715]. Trial Examiner Spencer: When you spoke of set up men, lathe men, you also meant the machine set up men?

The Witness: Yes, sir.

Trial Examiner Spencer: You are using the term interchangeably?

The Witness: Yes, sir.

By Mr. Chubb:

Q. Do any of the machine set up men in that department have any more authority than any other?
A. No, sir.

. . . . . .

[fol. 716] Q. The men that were working as machine set up men at the time of the strike, they are all paid the same rate?

A. Yes, sir; they are. Now those men are all paid the same rate. We have one new man with a little less experience.

Q. Now, let's go over to the——

[fol. 717] Trial Examiner Spencer: Excuse me, Mr. Chubb. Is it your testimony that these five men all had the same duties, the same functions?

The Witness: Yes, sir; it is.

Trial Examiner Spencer: One has no more authority than another?

The Witness: Not a bit.

. . . . . .

Q. Supposing the foreman was absent, suppose the foreman was absent, that would be Clark Gibson; suppose he was absent, would it still be true that these men all had about the same authority?

A. Yes, they all have the same work to do.

Q. Now we will go over to the wood dish department here and talk about the machine set up men there. Who were the machine set up men in the wood dish department?

A. Reed Shaffer and Ansel Smith.

Q. Ansel Smith is the same fellow they talk about as being Hank Smith?

A. Hank Smith, yes, sir.

Q. Now, do they get paid the same?

A. Yes, sir, they are both on the same rate.

Q. And is there any difference in their authority?

[fol. 718] A. Not at all.

Q. They have approximately the same authority as the set up men in the clothes pin department?

A. No authority in either case.

Q. I see. Paid on an hourly basis?

A. Yes, sir.

Q. In the absence of the foreman does either one of them have more authority than the other?

A. No, sir.

Q. Relative pay in the department, foreman first?

A. Yes, sir.

Q. Who gets paid the next?

A. These set up men.

Q. How about the veneer men?

A. They might earn a little more if they happen to have a good week of veneer to bring the average up.

Q. Do you mean they are on piece work?

A. Yes, sir.

Q. Yes; by the way, do these men get anything else than piece work?

A. No, sir.

Q. Now then it is kind of hard to compare the veneer men's pay with these men's pay?

A. Yes, sir.

Q. But you generally would think that for these men the [fol. 719] rate is higher?

A. Yes, sir, considerably higher.

. . . . . .

[fol. 720] Q. Did you say that Ansel Smith, or Hank Smith, has any more authority in the wood dish department than Reed Shaffer has?

A. No, sir.

Q. Now, the fellow called Mike Goheen, where does he work?

A. Paper dish department.

Q. Now, he is not working there any more?
A. Yes.
Q. He is working for you?
[fol. 721] A. Yes.
Q. Do you have any reason to know whether he is a member of the CIO or of the Independent Union?
A. I am pretty certain that he is a member of the CIO.
Q. Any reason to know that?
A. Yes, he attended the conference with the CIO, as one of their representatives.
Q. And he is working for you now?
A. Yes, sir.
Q. Now, what were his duties at the time of the strike?
A. Set up man in the paper dish department.
Q. And how many set up men are there in the paper dish department?
A. One.
Q. And how many machines are there in there?
A. Seven, eight, eight in there now.
Q. Eight?
A. Yes.
Q. And how is Mike paid, Mike Goheen?
A. Hourly.
Q. How does his rate of pay compare with the pay of other people in the room?
A. Higher.
Q. What?
A. Highest rate, except the foreman.
[fol. 722] Q. Who work on those machines, girls or men?
A. Girls pack the product from the machine.
Q. And they are on a piece rate, piece work basis?
A. No.
Q. Hourly basis?
A. Hourly basis.
Q. And did Mike have any different kind of authority, the set up man in that room, than the kind of authority that you say the set up men in the clothes pin department and the wood dish department had?
A. The same, but no authority. The same kind of work.
Q. Same kind of work. Is the paper dish department in a separate room from the wood dish department?
A. Yes, sir.

Q. The paper dish machines are in a different room from the wood dish machines?

A. They are.

Q. And who is foreman of the wood dish department?

A. McIlwee.

Q. Who is foreman of the paper dish?

A. McIlwee.

Q. Same foreman?

A. That is right.

Q. Now, Ira Crews, who is he, where does he work?

A. Works in the wood dish packing department.

[fol. 723] Q. Wood dish packing department?

A. Yes, sir.

Q. That is Sleeth's department?

A. It is.

Q. What does he do, what is his job?

A. Well, he has various jobs, what we call carrying the culls, they are the imperfect dishes that are thrown on the floor, they push them into the conveyor to go into the fuel conveyor, seal the boxes, seal the flaps on the corrugated boxes, put a little strip of tape over the joint, trucks them to the warehouses, and does all of those jobs of that kind.

Q. How many men are there in that room?

A. Four.

Q. How?

A. Four men in that room.

Q. Who are they—are they doing the same thing as Ira Crews?

A. Yes, sir.

Q. How many women are there in that department?

A. Twenty some, I could not just tell you the exact number.

Q. Packing, sorting and packing?

A. Sorting, packing, storing and packing.

Q. And how about the pay in that department, who gets the most pay? The four men?

[fol. 724] A. The foreman is the highest paid, the four men are the next highest paid.

Q. I see that I have to refer to the four, f-o-u-r men and not to the fore, f-o-r-e, man. Go ahead.

A. Those four men. The women are on an hourly rate.

Q. Do these four men have the right to hire and fire, or reprimand or discipline the employees in that department?

A. No.

Q. Do they have any disciplinary authority in that department?

A. No.

Q. Is that as true of Ira Crews as of anybody else?

A. Yes.

. . . . . .

By Mr. Chubb:

Q. Well now, supposing Alva Sleeth was away, do you know who, if anybody, would have any authority over that department?

A. McIlwee would have supervision over that department.

Q. Well, would any of these three men have any more au- [fol. 725] thority over that department than any other employees—I am talking about the Sleeth department?

A. Well, I suppose Ira Crews being the older man in years of experience in that department, would sort of be looked on as a temporary foreman.

. . . . . .

By Mr. Chubb:

Q. Well when Sleeth was away?

A. That was the question.

Q. Did you ever pay him any more for being temporary foreman?

A. No, sir.

Q. When you speak of Sleeth being away, you mean just temporarily, for a few minutes?

A. And sickness.

Q. Sickness or vacation?

A. Yes, sir.

. . . . . .

[fol. 726] Q. Now, what was the difference between the job that Mike Goheen had and Hank Smith had?

[fol. 727] A. Sam, except that one was wood dish and the other was paper dish.

Q. Lundy Grove had and the job that Mike Goheen had?
A. Similar, except one was on clothes pins, the other paper dish.
Q. Is that true of these men that I have been comparing, similar in all respects?
A. Similar.

[fol. 728] By Mr. Chubb:

Q. Now, Mr. Davis, you mentioned the position of Ira Crews in the wood dish packing department in the absence of the foreman on vacation or illness. How would you compare the position of Lundy Groves in the clothes pin department as to substituting for the foreman, with the position of Ira Crews in the wood dish department?
A. The same.
Q. You think it is the same?
A. Yes.

Trial Examiner Spencer: And may we have that extended just a bit. Now, when you were testifying about Ira Crews you stated that since he was an old man on the job, that is, he had more seniority than the others, in the absence of the regular foreman he might be regarded as a temporary foreman. Do you mean that that applies also to Lundy Groves?
The Witness: Yes, sir.
Trial Examiner Spencer: All right.

By Mr. Chubb:

Q. Lundy Groves is senior, is he?
[fol. 729] A. Yes, sir.

[fol. 730] Q. Yes. I would like to ask you if these men, Goheen, Crews, Dean, Meadows and Carm Reese, Lundy Groves, Hank Smith, Byrne Frame, do they punch time clocks?
A. Yes, sir.
Q. Always have?
A. Always have.
Q. Do the foremen punch time clocks?
A. No, sir.

Q. They are all paid by the hour, these men that I mentioned?

A. Yes, sir.

Trial Examiner Spencer: Now, just to get a complete comparison there. Would your testimony as to Ira Crews being an old man and therefore under some circumstances be considered a temporary foreman, apply to Ansel Smith?

The Witness: Well, it could, but I do not think we have ever used him in that capacity.

Trial Examiner Spencer: No, I am referring to the testimony of Ira Crews being old in seniority, and that as foreman he might well be considered a temporary foreman?

The Witness: Yes.

Trial Examiner Spencer: Would the same be true of Ansel Smith?

The Witness: I say it could be, but we have never so used him. He is the senior set up man in that department. [fol. 731] Trial Examiner Spencer: Well now, would the same be true of Carm Reese?

The Witness: Not now.

Trial Examiner Spencer: You do not have the comparison there?

The Witness: He is not in a position to use him there now.

Mr. Shroyer: Do you mean to refer back to the time of the strike? You said he is not now.

Trial Examiner Spencer: Well, referring back to the time of the strike, at that time he was an oiler?

The Witness: Yes, sir.

Trial Examiner Spencer: Would the same apply to Crews?

The Witness: Yes, sir his job sort of—the oiler's job in that case sort of puts him in that position.

Trial Examiner Spencer: I do not believe I understand your qualification of Ansel Smith.

The Witness: He is—what do you mean qualification, what kind of work he does?

Trial Examiner Spencer: Well, you said it would apply to him and then you qualified it in some way.

The Witness: Because he is the older man in seniority in the department, among the set up men.

Trial Examiner Spencer: Ansel Smith?

The Witness: Yes, sir.

[fol. 732] By Mr. Chubb:

Q. I want to ask you now about Irene Weese, that is Mrs. Groves?

A. Mrs. Groves.

Q. Will you, briefly, state her duties?

A. Well, she will be classed as paymaster. She takes care of my correspondence.

Q. How?

A. She writes my letters, correspondence, for me, stenographer, typewriter.

Q. What else?

A. She makes the records for the Social Security Board, also the Workmen's Compensation Department.

Q. The main books of the company, where are they kept?

A. St. Louis, Missouri.

Q. You have some books here, records?

A. One day book, which is the cash book.

Q. Who keeps that?

A. She keeps that?

Q. Do you have a telephone down there at the office?

A. Yes, sir.

Q. Who operates that?

A. Well, we have two, one on her desk, and one on my desk.

Q. Has Irene Weese been there ever since you have?

A. Yes, sir; before.

Q. Does she have any authority to hire and fire?

[fols. 733-735] A. No.

Q. Would you say that she is in a confidential relationship over there at the office?

A. Yes, she would be considered confidential.

Q. What duties does she have with reference to the payroll?

A. She takes the time cards from the foremen, and makes up the payroll.

Q. How?

A. She makes up the payroll from the time cards that are submitted by the foremen.

Q. Would you say that she is consulted by the employees in the plant about their personal affairs?

A. Every day.

Q. What do they talk to her about?

A. Oh, everything.

Q. How?

A. Everything from new babies, hospitalization, operations and so forth.

Q. Men and women both?

A. Men and women both, everything.

Q. Have you noticed any questionnaires around the office, Selective Service?

A. Dozen a day.

Q. Where do they come to?

A. Come to the office to be filled in.

. . . . . .

[fol. 736] Q. While we are on that subject of March 18th or 17th, was it the 18th that these folks were laid off?

A. 18th.

Q. Do you recall?

A. 18th.

[fol. 737] Q. The 17th was the last day for them to join the Union, is that it?

A. The 17th was the last day they worked.

Q. Then the 18th was the day when all these people came to the office, is that correct?

A. 18th, that is correct.

. . . . . .

By Mr. Chubb:

Q. What arrangements were made for identification of [fol. 738] union membership?

A. We had posted notices giving them ten days to qualify. The 10-day period expired on the 17th.

Q. The notice you are referring to is the Respondent Wallace's exhibit 12, which I now hand you?

A. Yes, sir.

Q. Well, that seems to bear date of the 16th of March, is that about the date it was posted?

A. Yes, sir.

Q. Where was it posted?

A. Posted in the clock office.

Q. Mr. Davis, that is rather short notice, isn't it, 16th to 17th? Did the employees in the plant have any prior notification of the contract between your company and the Richwood Clothes Pin and Dish Workers Union?

A. Yes, they did.

Q. I am referring to the contract of March—what was that; 17th?

A. 7th.

. . . . . .

Q. March 7th, which is in evidence here as our Exhibit 5. How did they get notice of that contract?

A. We tacked the whole contract on the bulletin board.

[fols. 739-757] Q. When?

A. Immediately upon receipt of it.

Q. You mean as soon as it was received back from St. Louis; I guess it was sent to St. Louis?

A. As soon as it had been approved by both parties.

Q. There wasn't anything secret about it?

A. Not a bit.

. . . . . .

[fol. 758] By Mr. Chubb:

Q. Mr. Davis, where does The Wallace Corporation here in Richmond get its logs from?

A. We get the majority of our logs from the Cherry River Boom and Lumber Company; the balance from smaller operators.

[fol. 759] Q. Well, now, the ones that you get from the Cherry River Boom and Lumber Company, where are they delivered? Where are they delivered to you, on the railroad track?

A. Yes, sir.

Q. And is there a spur track there on which the logs are moved in?

A. Yes, sir.

Q. Is that the Wallace Corporation's track or the track of somebody else?

A. It belongs to the Cherry River people.

Q. And where are the logs delivered—I mean where do you get them into the plant?

A. Well, the engine, switch engine, pulls them in alongside of our property, alongside of our pond, what we call the dock.

Q. And when they are actually rolled off the cars to go into the pond, when are they rolled off?

A. When we need them.

Q. Who does the rolling off, who does the unloading?

A. Well, that is done by both parties; sometimes the lumber company men unload them; most of the time, in recent months, our people, our employes have been unloading them.

Q. Do you unload them without the consent or the presence of the lumber company people?

A. Yes, sir.

[fol. 760] Q. Now, who controls the placing of those cars along, or the spotting of them on the spur track?

A. Controls the placing?

Q. Spotting the cars.

A. We ask them to spot them for us, and they do the placing.

Q. Well, do they have a right to take the cars away before they are unloaded?

A. If they are logs that have not been scaled with our men and their men.

Q. You mean scaling, measuring them?

A. Well, estimating them.

Q. Estimating?

A. Yes.

Q. Do they ever move the cars out of there before they have been scaled?

A. Yes, sir.

Q. After they have been moved in?

A. Before they have been scaled; yes, sir.

Q. Now, have you any knowledge of the movement of cars on that side track, spur track, loaded with logs, at or about the time of the election, say, the day before, or thereabouts?

A. They move logs on that track every day.

Q. No, I am asking you specifically: Have you any [fol. 761] knowledge about the moving of logs on that track about that time, whether they were moved on or off, or whether you knew anything about it.

A. Nothing more than our usual practice. They are moved every day.

Q. Do you know whether they were moved that day or not?

A. No, sir.

Q. Do you know whether they were delivered or moved around?

A. No, sir, I do not know.

Q. Do you know if the spur track was empty of cars at any time during the day of the election or the day before the election?

A. No, sir, I don't know.

Q. You don't know anything about it?

A. Oh, I heard some talk, but not definite knowledge.

Q. Did you order those cars to be moved out of there the day before or the day of the election or any other time around about the election?

A. No, sir.

Q. Do you know any one in connection with the company that did?

A. No, sir.

[fol. 762] By Mr. Chubb:

Q. Mr. Davis, did you personally have any connection with the Nicholas Republican?

The Witness: Will you repeat the question, please?

Trial Examiner Spencer: Read it again, please, Mr. Reporter.

(Question read.)

The Witness: No.

By Mr. Chubb:

Q. Do you have any interest or connection whatever with the Woodyard publications?

A. No.

Q. Do you have any knowledge of anybody in the company having any connection with either of them?

A. No.

Q. Now, did you take any part or use any influence or persuasion of any kind in connection with the Richwood Clothespin and Dish Workers' Union?

A. No.

Q. Richwood Clothespin and Dish Workers' Union, we have been calling it the Independent here.

A. No.

Q. Did you have any part in its organization?

A. I did not.

Q. Did you ever advise anybody about the forming of such organization with respect to it in any way?

A. I did not.

[fol. 763] Q. Did you ever suggest to your foremen or anybody in a supervisory capacity at the plant that they should use their influence in any way in behalf of the Richwood Clothespin and Dish Wo*ck*rers' Union?

A. I did not.

Q. How about the CIO, the same questions about it—did you use your influence for or against the CIO?

A. Neither.

Q. When I say CIO, I am referring to Local 129 of the United Construction Workers' Organizing Committee. You know what I mean?

A. Yes, sir.

Q. By the CIO?

A. Yes, sir.

Q. Where do you get your instructions as to what attitude you should take about these unions?

A. From the president of our company.

Q. Any particular occasion?

A. No, sir.

Q. Do you remember any particular occasion?

A. Yes, sir.

Q. When you talked about the matter?

A. Yes, sir.

Q. When was it?

A. Prior to the strike.

[fols. 764-765] Q. What about it?

A. Prior to the strike, I should say ten days or two weeks prior to the strike.

Q. What was that?

A. It was on Lake Michigan; I can't call the name of the town.

Q. Warsaw?

A. No, it was Harbor Point, Michigan.

Q. Were you up there?

A. Yes, sir.

Q. Did Mr. Wallace ever tell you that the plant would never operate under the CIO or that he would not recognize the CIO?

A. He did not.

Q. Did you ever tell your foremen that Mr. Wallace had said that?

A. Said that it would not operate under the CIO?

Q. Yes.

A. I did not.

[fols. 766-798] Cross-examination.

[fol. 799] Q. Do your foremen sign timecards?

A. Yes, sir.

Q. And—In the absence of a foreman who would sign a time card?

A. Well, somebody that would bring the timecards in [fol. 800] would verify—Anybody who would bring them from the plant into the office.

Q. Clark Gibson has been sick quite a bit the last couple of years.

A. Yes; he has been off three or four times, I suppose; yes, sir.

Q. When he was sick these different times who took his work over?

A. Well, it would not be taken over entirely,—could not be.

Q. Well,—As a matter of fact, didn't Lundy Groves do that?

A. Not all of it; no, sir.

Q. What would Lundy do of it?

A. Maybe did some part of it; he probably signed those [fols. 801-806] timecards and brought them into the office.

Q. He signed the timecards.

A. And brought them into the office.

Q. What else would he do?

A. He probably made some entries on the timecards.

Q. Well—With reference to the work what did he do, Mr. Davis?

A. He might tell the operators or the pressers what size packages to put up.

Q. I understand that there is about 80 employees in that department.

A. There are now.

Q. Well,—How many were there then?

A. I would say about 60 or 70 at that time.

. . . . . .

[fol. 807] Q. Now referring back to your interview with Mr. McKay in April, the same time he asked you about these other business facts we talked about before,——

A. Yes, sir; he asked me for the officers of the company, the names of the officers, where they could be located.

Q. And what your principal products were and your raw materials.

[fols. 808-813] A. Yes, sir.

Q. Do you remember telling Mr. McKay that if the employees were put back to work the company would close down and there were 225—would be 225 out of work instead of 44?

Mr. Chubb: I did not get that.

A. What was that again?

By Mr. Shroyer:

Q. If the employees were put back to work the company would close the factory down and there would be 225 out of work instead of 44.

A. We discussed some point like that.

Q. Well—Do you remember what you said about it?

A. No; but we had 240 employees at that time.

Q. Yes.

A. And it was my honest opinion that if these 40 employees were ordered to be put back the 240 that were working would be out of work; yes, sir.

Q. Why?

A. Why?

Q. Yes.

A. Because they won't work together.

Q. Oh, you mean that they would quit.

A. Yes, sir.

Q. The rest of them would all quit if the 44 were put back; that is what you mean?

A. Yes, sir.

. . . . . .

[fol. 814] Q. Now you have stated in response to a question by Mr. Chubb that you had nothing to do with the formation or sponsoring of the independent union; I just want [fol. 815] to broaden that question a little bit: I will ask you whether or not you or anyone else connected with the management had anything to do either directly or indirectly with organizing the independent union.

A. We did not.

Q. So far as you know.

A. We did not.

Q. Did you or anyone else connected with the management or anyone acting for the management have anything to do directly or indirectly with maintaining the independent organization?

A. We did not.

Q. Did you or anyone connected with the management or anyone acting for or on behalf of management so far as you know have anything to do with the preparation and publication of the editorials in The Nicholas Republican that have been exhibited in evidence in this case?

A. We did not.

Q. Did you or anyone connected with the management or anyone for or on behalf of the management directly or indirectly so far as you know have any agreement or understanding with Mr. Thompson with reference to the fostering, aiding, and maintaining of the independent union?

A. We did not.

Q. Something has been said with reference to Miss Weese going to Mr. Thompson's office and apparently staying there [fol. 816] to get information as to what may have happened at the independent-union meetings? Did Miss Weese ever report to you what had happened at independent meetings?

A. No; I would just say, No.

Q. Well—Did you ever direct or authorize or request Miss Weese to spy on the independent union or to obtain information as to what happened at their meetings?

A. Certainly not.

Q. Did Miss Weese ever go to Mr. Thompson's office or anywhere else at your request for the purpose of obtaining

information as to what happened at independent-union meetings?

A. No, sir.

Mr. Ritchie: That is all.

By Mr. Shroyer:

Q. Just one question on this piecework, Mr. Davis: In the clothespin plant do you use a ticket system or counters or how do they tell how much the employee is entitled to?

A. There are counters on the clothespin lathe.

Q. And you determine the wages that the employee made that day by the counters.

A. Yes, sir.

Q. On the machine; is that right?

A. Yes, sir.

[fols 817-832] Q. And if the foreman is gone who checks the counters? Would Lundy Groves do that?

A. Oh, any of the lathemen; the lathemen usually do that every day; check the counters.

Q. And what do they do with the information?

A. Because they want to know how such is produced on their machines they do it for their information.

Q. Well,—How does it get into the payroll department, Mr. Davis?

A. It is put on the cards of each employee.

Q. By whom?

A. By Clark Gibson, the foreman.

Q. So that what you meant a while ago when you said that Lundy Groves might do it by marking it on the time cards——

A. Any of the lathemen might do it.

. . . . . .

[fol. 833] MRS. IRENE WEESE GROVES

. . . . . .

Direct examination.

By Mr. Chubb:

Q. Will you state your name, please, Miss Weese?

A. Irene Weese Groves.

Q. How are you known around the plant generally? As Miss Weese?

A. That is right.

Q. You work for The Wallace Corporation.

A. I do.

Q. How long have you worked for them?

A. 15 or 16 years.

Q. Would you please tell us now with reference to about last fall before the strike started—Would you tell us what [fol. 834] your duties were over at the Wallace Corporation? Just describe them.

A. My duties were the same then as they are now; I keep the payroll records, figure the timecards, check the time, the rates, extend them, and copy them on the payroll, make up the payroll sheets, make the checks, sign the checks, because that is a part of the payroll work, and I check in—pay invoices, keep the cash record; I make the earnings record of the employees, the employment record, the workmen's compensation reports, various clerical work; I take dictation from Mr. Davis; just routine office work.

Q. What was your training in school, Miss Weese?

A. Commercial work.

Q. That is a term the school uses for stenography and typewriting largely; isn't it?

A. That is right; short*ahdn*, typewriter.

Q. Bookkeeping, perhaps.

A. Yes; I had bookkeeping.

Q. Will you state generally about the books of account of the company? Where are they kept? The main books of account.

A. The general books are kept in the St. Louis office.

Q. And here what books of account or records do you keep?

A. Only those that are necessary for the operation. This is considered the mill by the company office.

[fol. 835] Q. I see.

A. Just keep only the records that are required there.

Q. Now with respect to payments here, what payments do you pay from this office as distinguished from the St. Louis office?

A. We pay all invoices for mill supplies; our invoices for material such as logs, paperboard, wire, and things like that are paid from the St. Louis office.

Q. Now, I suppose, of course, you pay all payrolls here; is that right?

A. Yes.

Q. And are you paid personally on a salary basis or a time basis?

A. Salary basis.

Q. Do you punch time timeclock down there?

A. No.

Q. Will you tell about orders? If orders for pins, that is to say, clothespins,—How do they go? Do they go to—What department are they sent to?

A. They come to us through the St. Louis office or the New York office and when they come in we simply make up the shipping order, the billing, and send them out to the shipping department to be loaded.

Q. What part do you personally have in that process?

A. Well, I do not have any particular part of it unless [fol. 836] the boy is away that does that work, and then I do.

Q. And who is the boy who does that work?

A. At this time Elesmore Jeffries.

Q. And who was it?

A. Doyle Brown. Doyle left.

Q. He just left.

A. He just left.

Q. Now, Miss Weese, you have a good many duties and activities, I take it, and I do not want to pry or appear too inquisitive but do you have a political office?

A. Yes.

Q. What is your office?

A. I am recorder of the city of Richwood.

Q. And is that an elective office?

A. Yes.

Q. How long have you held that?

A. I was appointed for one year and been elected for a total of three years, for four years altogether.

Q. What are the duties of the recorder?

A. I attend the council meetings, keep a record of their proceedings, and then, in addition to that, ex officio clerk, by reason of being recorder I am ex officio clerk of the police civil service commission.

Q. Police civil service commission?

A. Yes, sir.

[fol. 837] Q. And are those duties pretty arduous or are they after hours at the office?

A. After hours at the office.

Q. Now do you know Mr. B. E. Thompson of The Nicholas Republican?

A. Yes; I do.

Q. How long have you known him?

A. I have known him since he has been in Richwood; I do not know how long that would be.

Q. Do you have occasion to go up to Mr. Thompson's office or did you have occasion to go up to Mr. Thompson's office last year from time to time? Last winter?

A. Yes; I go there.

Q. Well, now state what occasioned your being at Mr. Thompson's office, especially in the evening, Miss Weese.

A. Well, I go there frequently because they do the printing work for the company; we have all of the records that we need in our office printed, including the payroll checks, and, in addition, they do all the printing for the city and for the police civil service commission and I am quite often in there on business and I am in there occasionally just to visit; I am acquainted with Mr. Thompson and his family.

Q. Is it a common gathering place for chatter?

A. Yes, sir.

Q. And has Mr. Thompson any official position in the [fol. 838] city, too?

A. He was a member of the police civil service commission; yes.

Q. Do you have any occasion to talk with him on that?

A. Yes, sir; quite often.

Q. Do you recall any occasion when you have been up there late at night, Miss Weese? Late at night: say midnight or thereabouts.

A. Particularly?

Q. No. I say, Do you remember whether you have or not during the last winter?

A. Oh, yes; I should say not later than midnight; my husband and I would pass there frequently at times when he was running his paper and would stop in and ask for his paper.

Q. Is that a frequent occurrence or not? Other people do that besides you.

A. That is right.

Q. Now, are you generally familiar with the events that accompanied the strike over at The Wallace plant, the organization of the union, and so forth? You were aware of the fact that the union had been organized; weren't you?

A. Yes.

Q. Were you present at an open meeting I understand held on the school grounds last—Well, late last summer or early last fall?

[fol. 839] A. I was present at a meeting one Saturday afternoon and I think it was held some time during the month of July.

Q. During the month of July.

A. That is about a year ago.

Q. What took place at that meeting?

A. Well, let's see. On Saturday there was a sound car driven over the streets of our city and they invited the people and particularly the employees of The Wallace Corporation and the Cherry River Boom & Lumber Company to attend and that evening I was on the street and I thought I was given an invitation because it was announced through this sound system that "The mayor wants you to be there" and, being associated with the city government, I thought I would attend it and I did.

Q. Was the mayor there at the open meeting?

A. No; a letter was read from the mayor saying that he was unable to attend and welcoming them to the city.

Q. You say "them"; whom are you referring to?

A. The CIO. This meeting was sponsored by the CIO. And that letter was read at the meeting.

Q. Do you remember anything else?

A. Nothing in particular.

They read the contract they said they had negotiated with the Cherry River company, a union contract between the company and their employees.

[fol. 840] Q. That is the paper company as distinguished from the lumber company.

A. Yes.

Q. Did anybody—Did Mrs Davis or anybody else connected with The Wallace Corporation suggest or ask to go to this meeting?

A. No, sir; I voluntarily went.

Q. Now, Miss Weese, did you ever attend any other meeting of the CIO group at any time?

A. No, sir.

Q. Now did you know that there was a union called the Richwood Clothespin & Dishworkers Union? Did you know that there was?

A. I know there is.

Q. Yes.

A. I heard about it last fall.

Q. Do you know who the business agent of that union was?

A. Yes.

Q. Who?

A. Mr. Thompson.

Q. Yes.

Now I will ask you if you ever attended any meetings of the Richwood Clothespin & Dishworkers Union.

A. Not any.

Q. How?

[fol. 841] A. Not any of them; I was never present at one of their meetings.

Q. Did you ever discuss with Mr. Thompson any matters connected with the relationship of The Wallace Corporation employees and the union, about the union?

A. Yes; on several occasions. One I remember in particular was one evening we were in the office; it happened to be the evening of the day that Mr. Thompson with some of the union committee—I don't know who—had a conference with Mr. Davis in regard to a contract; and my talk with Mr. Thompson has been more in the sense of—Mr. Davis—I do not want to——

Q. When was that?

A. This particular evening Mr. Thompson and a committee—I don't know just the committee it was—called on Mr. Davis and they were in another room; they maybe talked quite loud about things, and when I was in Mr. Thompson's office that evening I told him the next time he called at the office I wished that he would be a little bit more quiet; it was difficult to work like that.

Q. This was more or less jocular.

A. Yes; I was only kidding him.

Q. Well, that was after the organization.

A. Yes.

Q. You knew about his contract between the company and Mr. Thompson's union; didn't you? You knew about [fol. 842] that.

A. Yes.

Q. Was it after the contract?

A. I think that that must have been before the contract was signed. I don't remember the definite date but I think they were negotiating the contract at the time.

Q. Now, Miss Weese, there was a question about a telephone call some time in the fall, last fall, from Verdie Groves to you about the independent union; do you have any recollection of a telephone call last fall from Verdie Groves?

A. I received a telephone call one night while I was in a council meeting.

Q. From Verdie Groves?

A. The person said she was Verdie; I could not identify her.

Q. Do you know Verdie Groves?

A. Yes; I do.

Q. Does she work in the factory?

A. Yes.

Q. Still works in the factory?

A. Yes.

Q. What did she say, Miss Weese? Do you remember?

A. She called and said they were having a meeting at our house and asked me if I could come over.

Q. What did you tell her?

A. I told her that I could not.

[fol. 843] Q. What else did you tell her?

A. I told her that I was tied up in the council meetings. I didn't have any regular hours, and I didn't know just when the business would be finished, and I told her that I was tied up there for the evening and it was impossible for me to come.

Q. Just what did she say?

A. Well, she said, could I refer her to somebody who could help her.

Q. What did you say to that?

A. I referred her to The Greater Richwood Federation.

Q. What is The Greater Richwood Federation?

A. It is similar to the chamber of commerce, an organization of the business and professional people of Richwood to look after the interests of the city.

Q. And did you have any particular reason for referring her to them?

A. No; that was the first thing I could think of when she asked me.

Q. Was that before or after the strike started?

A. That was after the strike, after the strike started.

Q. Were you in an open meeting at the time?

A. Yes.

Q. Where people could hear what was being said?

A. Yes.

[fol. 844] Q. What did she say to that?

By the way, was Mr. Thompson connected with The Greater Richwood Federation?

A. I presume he is.

Q. I mean was he at that time?

A. I presume he was.

Q. And do you remember whether you mentioned Mr. Thompson's name or not?

A. Not that I recall. The meeting was going on when she called and she said, "Well, who shall I call?"

I said, "Greater Richwood Federation; I would recommend them."

She said, "Who in particular?"

And I said, "Well, I believe you would call the president."

Q. Did you know who was the president?

A. If she had asked I could not have told her; I don't remember whether she asked me or not.

Q. Now was there any conversation about you sending anybody over to the meeting yourself?

A. No, sir.

Q. Was there any further conversation on the phone?

A. No; that was all.

Q. Did you send anybody over to Mrs. Groves?

A. No, sir.

[fol. 845] Q. Do you know Hezzie Shaver?

A. Yes; I do.

Q. Is he here?

A. Yes, sir.

Q. The gentleman sitting here?

A. That is right.

Q. How long have you known him?

A. I have known him since I have been working at the plant and since Mr. Shaver has been working at the plant.

Q. Do you recollect any occasion when you talked to Hezzie Shaver in the street or otherwise last winter during the strike or at that time?

A. Yes; I talked with him frequently; he stopped me and talked with me on the street; he talked with me.

Q. Do any of those conversations stand out in your mind at all?

A. Well, he especially wanted to know when the plant was going to resume operations which was a question I could not tell him and I told him that all my information came from the street and that he loafed on the street more than I did at that time and he should know more about it than I did. And then he also wanted to know in regard to his unemployment compensation and wanted to know whether I would advise him to sign up for it.

And I told him that I thought it would be proper for him to but I did not know whether he would draw any benefits [fol. 846] but he at least could qualify himself for it.

Q. And did you ever discuss the strike or the union with him?

A. No, sir, not in a particular way; our conversation in regard to when the company would resume operation I guess would be classed under the strike.

Q. Did you ever ask him to join any union?

A. No; I never did.

Q. Did you ever tell him not to join any union?

A. I did not.

Q. Did you have any understanding about or instructions from Mr. Davis about whether you were to take any part in this union matter?

A. Well, Mr. Davis told us that the office people should keep out of it.

Q. Did you attend the foremen's meetings?

A. No.

Q. Did you ever go into the foremen's meetings from time to time?

A. Yes; occasionally when Mr. Davis would call me in to find out about rates or hours or something of that nature.

Q. Do you recall any other conversation with Hezzie Shaver at all other than you have mentioned?

A. I recollect one conversation when he walked up toward the plant with me one morning and I believe that was in [fol. 847] regard to the unemployment-compensation matter.

Q. That is about all.

A. That is all.

Q. Now let me see. There was Mr. Mac Blankenship; do you know Mac Blankenship?

A. Yes, sir.

Q. Is he working at the plant?

A. He is employed at the plant.

Q. Do you recollect having a conversation with him at one time while you were walking down the street? Did he call you over and have a talk with you?

A. Yes, sir.

Q. Yes. Did—Was anybody with him?

A. Yes; I remember a conversation I had with Mac Blankenship and Arnold Smith and Wallace Johnson one morning; I was on my way to the factory and they called me over, Orville Smith.

Q. What was said at that time? Do you remember?

A. Yes; I do.

Q. What was said at that time?

A. Well, if I remember right they asked if I knew where they could find jobs and, just kidding, I said, "If this thing keeps on I may join you and be looking for a job myself."

We talked about various matters, nothing in particular. [fol. 848] I believe they did ask me about the results of the election down at the Belle plant, which has been in the paper that morning, and I told them as near as I could the figures that had been given in the paper.

Q. The Belle plant.

A. Yes; duPont plant at Belle.

Q. Oh, at Belle.

A. Yes.

Q. Did you have any conversation with these men on this occasion to which you referred about the unions, either of the unions, or your opinion about either of the unions?

A. I did not express my opinion on the unions at any time; no, sir.

Q. Did they ask you about it?

A. Yes, they did.

Q. What did they ask you?

A. They asked me if I thought the independent union would be better or the CIO for them.

Q. And what did you say?

A. I told them that that was a problem for them to decide.

Q. Do you recollect having said something about the dues to the independent staying in town and the dues of the CIO going out of town on that occasion?

A. I remember the statement but I did not make it.

Q. Who made it?

[fols. 849-869] A. Mac Blankenship.

Q. It was a kind of argument among the men; was it?

A. Yes.

Q. The only thing you said to them was what you have just said.

A. Yes, sir.

Q. Did you indicate your opinion in any way when Mac said that?

A. Well, it wasn't my turn to say anything, the way he expressed it.

Q. Well, did you or didn't you?

A. No; I did not.

. . . . . .

[fol. 870] By Trial-Examiner Spencer:

Q. There is one portion of your testimony I would like to [fol. 871] ask you a question or two about: Your testimony was that Mrs. Groves called you on the phone—that is, a person that said she was Mrs. Groves, and you stated, I believe, that you had no further identification of the voice than that it was Mrs. Groves.

A. Yes, sir.

Q. And asked your advice—But I didn't get it clearly just what about.

A. She said they were having a meeting and she invited me over.

Q. Now did she give any details as to this meeting?

A. She said, "There is a group here that wants to organize a union."

Q. I see. She invited you to come to that meeting.

A. Yes.

Q. Now you testified that you referred her to The Greater Richwood Federation and suggested that she call the president; I believe that was your testimony.

A. That is right.

Q. But you did not know who the president was.

A. I did not; no, sir; I had forgotten if I knew.

Q. Did you know at a later time?

A. I learned later it was Mr. Dave Marshall.

Q. Mr. Dave Marshall.

A. Yes, sir.

[fol. 872] Q. Was president at the time of this telephone conversation.

A. Yes, sir.

Q. Do you have any knowledge whether or not Mr. Thompson attended that meeting at Mrs. Groves' house?

A. Well, I have heard some discussion of it since and I have heard that he did but I don't know.

Q. He did not tell you so.

A. No, sir.

Q. You had no discussion with him relative to this meeting at the Groves house.

A. Yes; I think I have; but I don't remember any particular discussion.

Q. You don't remember just precisely what the discussion was, you mean.

A. I remember of asking him how he got in on the meeting and he said he received a telephone call.

Q. Did he say who he received the call from?

A. He said he received the call from Mrs. Verdie Groves.

[fols. 873-895] By Mr. Shroyer:

Q. Going back to the telephone conversation with Mrs. Groves once more, did she at that time ask you if she might have a copy of the payroll or list of the employees of the company?

A. It is possible she did; several asked me.

Q. For a copy.

A. At various times.

Q. I believe you further testified that you could not remember Thompson's name being mentioned in that telephone conversation.

A. That is right.

Q. Would you say that his name was not mentioned in that conversation?

A. I would say that I have no recollection of it being mentioned.

[fol. 896] STIPULATION

Mr. Chubb: Mr. Examiner, I would like to raise a question respecting one branch of this case, and to ask Mr. Shroyer his position upon the question with the idea of possibly abbreviating the record.

Referring to the Respondent's Exhibit 1 in this case, being the agreement of January 19, 1942, made concurrently with the agreement for consent election, paragraph (3), contains the provision that the company will put the—will return Harvey Dodrill to a position substantially equivalent to the one formerly held, without loss of his seniority or other rights, if so directed by the Regional Director for the Ninth Region.

I would like to ask Mr. Shroyer if the Board takes the position that the company has breached that provision of the agreement.

Mr. Shroyer: I believe I stated at the outset of this proceeding, in answer to Mr. Chubb's motion to dismiss that it was the contention of the Board that the agreement which is in evidence as Respondent's Exhibit No. 1 had been breached by acts of the Respondent subsequent to the execution of the agreement. However, at no place in our proof have we introduced any evidence showing a violation of paragraph 3, being the paragraph with reference to Harvey [fol. 897] Dodrill, and it is not the contention and the claim of the Board in this proceeding that paragraph (3) has been breached.

In other words, the breaches framed by the Board are two other matters other than the paragraph (3), and not paragraph (3).

Mr. Chubb: Thank you. That allows me to adopt my proof to that position. I take it that that statement is without objection on the part of the Examiner?

Trial Examiner Spencer: That is quite all right.

Mr. Chubb: Any objection, gentlemen?

Mr. Ritchie: No objection.

WILLIAM T. CHRISTMAS

Trial Examiner Spencer: Let us have your full name, please.

The Witness: William T. Christmas.

Mr. Chubb: Mr. Examiner, before the close of the hearing yesterday, I believe you asked us to produce data with respect to the rate of compensation of the employees of The Wallace Corporation, particularly the ones on whom the issue has arisen as to their supervisory capacity.

Trial Examiner Spencer: Yes, Carm Reese, Lundy [fol. 898] Groves, Ansel Smith; I believe Ansel Smith is referred to at times as Hank Smith, isn't he?

Mr. Chubb: Right.

Trial Examiner Spencer: As to these men, the question has arisen as to their supervisory capacity.

Mr. Chubb: Mr. Examiner, we have produced this morning a payroll from the factory records for the week September 14, 1941 September 20, 1941, which, I take it, for this purpose is a satisfactory date and without introducing it in evidence, I would like to ask Mr. Christmas somewhat out of order of his testimony, about the facts in the matter, and if I may I would like to go a little bit farther than the Examiner requested with respect to the classification.

Trial Examiner Spencer: Mr. Shroyer, do you have any objection to the use of the payroll Mr. Chubb has as a basis for the examination?

Mr. Shroyer: No, it is quite all right.

. . . . . .

[fol. 899] A. This is the last full payroll before the strike began. In the clothespin department, Clark Gibson is foreman; his weekly rate $38.50; paid by the week.

The rate of pay to the girls, who work on piece work, ranged from 30 cents minimum to 37.5 cents an hour.

The man classified as a truck , 40 cents per hour.

Slitter, that is also a man, 40 cents an hour.

[fol. 900] The man working on the spring-pin machine, 45 cents per hour.

In that department there were four men called "lathe men"; their names are Bender, Keener, Keene, and Lundy Groves.

The hourly rate of those last four, 62 cents.

The next department is the mill room.

Q. Yes, just proceed with the different departments, without further discussion.

A. Harry White, foreman——

Q. And, Mr. Christmas, could you mention as you go along the particular men in which we have been interested, you have heard the testimony, and you know who they are.

A. Yes, Harry White, foreman; $33 per week. Saw filer Robinson, 87½ cents an hour. Sawyer, 60 cents per hour. And the oiler, Carm Reese, 46½ cents per hour. Strip picker, Heffner, 40 cents per hour. Slitter, a man named Frame, 48 cents per hour. Filer and grinder, Griffie, 56½ cents per hour. Dryer, Ivan Frame, 45 cents per hour.

The man working on the deck, Snyder, 42½ cents per hour.

Sawyer, 60 cents per hour.

A man named O. B. Frame, working part of the week as [fol. 901] oiler at 46½ cents per hour and part of the week on an equalizer machine at 44 cents per hour.

A man working on the pond, Shaver, Hez Shaver, 46½ cents an hour.

[fol. 902] The Witness: A man working part week is an equalizer at 44 cents an hour and part of the week as a drier at 42 cents an hour.

The next man is a dogger, and his name is Tolliver, 48 cents per hour.

A man working on the deck, Bashaw, 42½ cents per hour.

By Mr. Chubb:

Q. Now, did you read the name of Carm Reese there also?

A. Yes, sir.

Q. At what rate?

A. 46½ cents per hour.

Q. And is there another oiler too in that list?

A. Yes, there is.

Q. And his rate?

A. 46½ cents, per hour.

Trial Examiner Spencer: The witness refers to him as an oiler; when acting as an oiler his rate was 46½ cents?

Mr. Chubb: That was my understanding, I was not sure the comparison had been in there. All right, proceed.

The Witness: The next department is maintenance and power, Sisco Gibson, foreman, $38.50 per week.

Electrician, Huggins, 50 cents per hour.

Spring machine man, Heffner, 50 cents per hour.

[fols. 903-904] The following men worked on spring pin splinters: Smith, Orville Smith, Marshall, Smith, 45 cents per hour; Marshall, 42 cents per hour; Greene, 40 cents per hour and Pullen 40 cents per hour.

Q. Is it understood that that is not Ansel Smith?

Mr. Shroyer: Yes.

Mr. Chubb: All right.

The Witness: Machine shop, barrack man, 58 cents per hour.

Engineer, Blankenship, 44 cents per hour;

Engineer, Huggins, 50 cents per hour.

Fireman, Godfrey, 44 cents per hour; Harris, 44 cents per hour.

Fireman and engineer, Shoemaker, 44 cents per hour, that is T. M. Shoremaker. The other Shoemaker was a fireman at 41 cents per hour.

General repairman, H. S. Keener, 45 cents per hour.

Trucker, Osborne Frame, 40 cents per hour.

. . . . . .

[fol. 905] The Witness: Wood dish packing department, Alva Fleeth, foreman, $30 per week.

The girls average 32¼ cents per hour. They were on piece work.

Trucker, Lee Gillespie, 44 cents per hour.

Ira Cruse, tull raker, 44 cents per hour, and Cottell, sealer, 44 cents per hour.

Now, the wood and paper dish department, Wilbur McElwee, $43.50 per week.

Machinist, Shaffler, 60 cents per hour.

Working on veneer machine, B. H. Meadows and George Tyree, both earned $23.90 in 40 hours on piece rate.

By Mr. Chubb:

Q. That is a little, slightly less than 60 cents per hour.

A. Slightly less than 60 cents per hour average.

Paper slitter, Blankenship, 40 cents per hour.

The girls operating the paper dish machines, 40 cents per hour.

Machinist, Ansel Smith.

Mr. Chubb: There is Ansel Smith.

The Witness: 60 cents per hour.

[fol. 906] Paper dish department, ~~Knight~~ Goheen, 52 cents per hour.

Paper dish department, Kelso Meadows, 45 cents per hour.

Mr. Chubb: May I comment on that, Mr. Examiner? These names that have been read off are supposed to be typical, the classifications we have mentioned here, for example, these last two, Goheen and Meadows, because they have been mentioned in the testimony. I want to say that when Mr. Christmas stated "Dish department", he was referring literally from the payroll. Under the caption for these people it simply said "P. D. Dept:" opposite the name of both of those men, and that is the reason this was given, there isn't any other indication of occupation.

Mr. Ritchie: I didn't get the rate for Goheen and Meadows.

The Witness: Mike Goheen, 52 cents per hour; Meadows 45 cents per hour.

. . . . . .

[fol. 907] Trial Examiner Spencer: I think I also inquired as to the matter of wage increases. I might ask at this time if the same wage scale obtained at the time the factory opened after the strike, or was there any change made in the wages?

Mr. Chubb: Yes, I would like to have it in the record.

The Witness: Yes; sir, there have been changes.

Mr. Chubb: Go ahead.

The Witness: Since that payroll.

Trial Examiner Spencer: Well, what about the time the plant reopened, were there any changes effected?

The Witness: At the time the plant reopened the only change was that between the time the strike occurred and the time the plant reopened there was a wage and hour order covering the wood turning industry which set a minimum of 35 cents per hour. That, of course, went into effect as soon as the plant opened in January.

Trial Examiner Spencer: Yes.

Mr. Chubb: I would like to go a little farther with that; Mr. Christmas, I know, is familiar with it. Are you familiar, Mr. Christmas, with the contract of March seventh with the Richwood Clothespin and Dish Workers Union?

A. Yes, I am.

Q. Briefly, as I understand it, that contract provided for a flat increase, didn't it?

A. Yes, it granted a percentage increase to become ef-[fol. 908] fective at the time the plant reopened.

Q. Retroactively?

A. Retroactively back to the time the plant opened.

Q. What was that increase, do you know?

A. Five per cent.

Q. Now, was there any provision about wages put in the contract?

A. Yes, there was.

Q. And what was it?

A. There was a provision that a committee would be appointed by the union as soon as the factory reopened, a committee to discuss all the rates with a view to determining whether there should be further increases or not.

Q. An adjustment or equalization?

A. That is right.

Q. Now, did you make a careful computation of the effect of the subsequent assessment pursuant to that contract?

A. Yes, I have.

Q. How much was the increase, or can you say the increase in percentage?

A. Well, I can state the increase in percentage, from the time the plant closed until the present, that is the amount of the increase from the old rate to the rate now, it was a fifteen per cent overall.

Mr. Shroyer: Just a minute. May I ask whether this [fol. 909] percentage that you are now giving would also include any adjustments that were made pursuant to the Wage and Hour Law?

The Witness: Yes, it would include that also.

Mr. Shroyer: You are not differentiating that?

The Witness: No, sir.

Mr. Chubb: The increase under the Wage and Hour Law was the one you mentioned?

The Witness: In the paper and dish department, I might say that the wage-hour order was much earlier, and the minimum in the paper dish department is 40 cents per hour and was prior to the strike.

Trial Examiner Spencer: Now, aside from the general wage increase that was effected by the agreement between the Company and the Independent and the requirements of the Wage-Hour Law, were there any other general increases given and have there been since the period of the strike, you have mentioned two.

The Witness: None except that this committee was formed and it considered its work and there were additional increases made.

Trial Examiner Spencer: Pursuant to the work of the committee?

The Witness: Yes, sir.

Mr. Chubb: As a result of collective bargaining?

The Witness: Yes, sir, that is correct.

[fol. 910] By Mr. Chubb:

Q. Mr. Christmas, will you describe, very briefly, the organization of The Wallace Corporation, its officers, and so forth.

A. The main office of The Wallace Corporation is in St. Louis, Missouri. All of the general books are kept there and sales are directed from that office.

We have this factory at Richwood, West Virginia; we also have a factory at Warsaw, Wisconsin, and another factory at Escanaba, Michigan, which has not been operated for a period of years and at present it has been sold.

We formerly had offices in New York, but they were [fol. 911] closed early this year.

Q. Who are the officers of The Wallace Corporation?

A. M. B. Wallace, Jr., President; William T. Christmas, Vice President and Treasurer, and W. R. Chubb, Secretary.

Q. How long have you been with the company, Mr. Christmas?

A. Since September 13, 1941.

Q. Mr. Davis, of course, is in charge of the Richwood plant?

A. He is.

Q. Does he have a title?

A. He is superintendent of the Richwood plant.

Q. And would you state, please, your experience, first, your source of supply as to the logs and raw material there.

A. Practically all of the logs that we use come from the Terry River Boom and Lumber Company.

Q. And what exceptions are there to that rule?

A. Well, occasionally, Mr. Davis buys some logs from farmers in the surrounding country who cut logs at different times when they do not have other work and haul them in by truck.

Trial Examiner Spencer: Is that a large or small percentage of your raw materials?

The Witness: It has been very small in recent months.

Trial Examiner Spencer: Is there any corporate affiliation between the Terry River Boom and Lumber Company and The Wallace Corporation?

The Witness: None whatsoever; no, sir.

[fol. 912] Trial Examiner Spencer: Is there any connection whatever other than the matter of the buying of these logs that you mentioned?

The Witness: Only that of a customer and a seller.

. . . . . .

[fol. 913] Q. When did you first become active in the situation here at Richwood personally?

A. On the morning of October third I met representatives of the CIO and a representative of the U. S. Conciliation Service in Charleston, West Virginia.

Q. As I understand it, there were no tangible results from that conference?

A. No, there were not.

Q. Now, when was your next meeting about the matter?

A. Mr. Addicks, of the Conciliation Service office in Cincinnati, called me about a week later on the telephone and asked me to meet him again in Cincinnati, and I did. I [fol. 914] believe it was on the thirteenth of October I met with Mr. Addicks and the representatives of the CIO.

Q. Mr. Christmas, you took notes at the time, contemporaneously, of those conferences, did you?

A. Yes, sir.

Q. Would you like to have those there for reference?

A. Yes, I would like to.

Q. I am handing them to you, in case you need to refer to them to refresh your recollection of dates and so forth. Are there any features of that conference—did that conference result in any action of any kind?

A. No, it did not. The point on which we could not agree was the method of determining the majority.

Q. You have read the testimony here about that matter. Do you have any additional light to throw upon the issue between the company and the union at that time?

A. Well, during all my talks with the representatives of the CIO I am sure that I made it clear that the company was not antagonistic in any way towards unions as such. Mr. Wallace so instructed me that the only thing he wanted to be certain of was that a majority of his people did want a certain union, and the point we could never agree on was the method by which that was to be determined. The company wanted a Labor Board election.

Q. Now, what was the next meeting or the next activity [fol. 915] that you took in this matter?

A. We had a letter from the Cincinnati office of the Labor Board, dated October fourth, advising us that a charge had been filed against us as intimidating and coercing our employees in their union activities. Now, it was——

Q. Just a second, Mr. Christmas. I think that it is in evidence. It is in evidence, it is our Exhibit—I don't believe it is, but never mind. It is stipulated there was a letter of that type sent on that day.

Mr. Shroyer: So stipulated.

Mr. Chubb: All right, proceed.

The Witness: Of course, it was after that when I met the second time in Charleston with the CIO and Mr. Addicks, on the thirteenth of October. Then, on October twenty-first, Mr. Phillips of the Cincinnati office of the Labor Board told us over the phone that he was going to arrange if it was possible to have a representative of the Board go to Richwood and adjust the charges.

. . . . . .

[fol. 916] The Witness: My next contact was a telegram from Russell R. Miller, representing the Labor Board, asking whether or not the management of The Wallace Cor-

poration would meet him and the CIO at Richwood on Monday, November second, and I sent a telegram back to Mr. Miller the same day, October thirtieth, telling him that we would meet him in Richwood.

After sending the telegram, I telephoned Mr. Miller at the Kanawha Hotel in Charleston, and asked him to tell me a little more about the purposes of his visit, I wanted to determine whether it would be well for both Mr. Wallace and myself to come down.

I asked Mr. Miller if he was going to try to settle the whole thing. He said that was one of his principal reasons for coming down. So I then confirmed that Mr. Wallace and myself would meet him. Do you want me to go right [fol. 917] ahead?

Mr. Chubb: Yes, just go right ahead with your chronological statement and your connection with the matter.

The Witness: Mr. Wallace and myself met with Mr. Miller at The Wallace Company's offices at two o'clock on the afternoon of November third, in Richwood. There were present at the meeting representatives of the CIO, including Mr. George Kidwell, James Gallagher and Thurman Farmer; Harvey Dodrill.

Mr. Wallace had asked our foremen to be present in order that they might be available for questioning and as soon as we were all settled Mr. Wallace turned the meeting over to Mr. Miller.

In addition to Mr. Wallace and myself there was present A. F. Davis and Miss Irene Weese and all of the foremen.

Mr. Miller then told us the substance of what the charges were and that the purpose of his visit to Richwood was to determine whether these charges were true.

Mr. Chubb: Mr. Christmas, may I interrupt you a moment. What did Mr. Miller state with respect to the inclusion in the charges of dominating the union, being included in the charges?

The Witness: Well, my note here says it was in the first five minutes of this meeting was definite, and I made these minutes immediately after the meeting, that Mr. Miller [fol. 918] made the statement that he had concluded that the Independent union was company dominated.

By Mr. Chubb:

Q. Well, did he state that as a result of his investigation of the charges?

A. He did, according to my notes here.

Q. Yes. All right, go ahead.

A. I asked Mr. Miller at that time whether he felt that he had sufficient information to reach such a conclusion, and I asked him if it were not a fact that all of his information had come from the CIO people up to that time. He said that he had: Later on he corrected that and said that he had talked to some of our employees in Charleston.

I then asked whether those statements were all from members of the CIO or whether there were some others there? And he said that he did not know.

At any rate, the meeting did not come to any agreement. Mr. Miller proposed that if the company would consent to an election, eliminating the Independent union, on the question of the CIO, yes or no, that he felt that he could persuade the CIO people to agree to that.

As a matter of fact, the CIO had already agreed to that in their correspondence with me.

Q. Did Mr. Miller make any recommendation or proposal as to the disestablishment of the Independent at this meeting?

A. Yes, he said that, of course, that if we would agree to [fol. 919] the proposal that he made, the Independent union would have to be out of the picture.

Q. And did he question the foremen at that meeting?

A. Mr. Wallace told Mr. Miller that he had the foremen present and available for his questioning, and Mr. Miller first said that he did not have any questions to ask them, but later on he did ask their names and the departments in which they worked. I think he made some inquiry as to their assistants, whether they had any assistants.

Trial Examiner Spencer: Did Mr. Miller make any reference to——

The Witness: How is that, sir?

Trial Examiner Spencer: I have not finished. Did he make any reference to what character of evidence he had based his conclusion on that the Independent was company dominated? In other words, did he state to you that cer-

tain supervisors were interfering with the administration of the Independent or anything to that effect?

The Witness: If I may look at these notes just a moment, please.

Trial Examiner Spencer: You do not recall without looking at the notes?

The Witness: No, sir, I do not. (After inspection) Yes, he did; I find here, after questioning the foremen.

[fol. 920] Trial Examiner Spencer: You are reading from your memo?

The Witness: No, sir; I am not, but I will be glad to.

Trial Examiner Spencer: Give it from your recollection after refreshing your memory.

The Witness: Mr. Miller asked each foreman if he had an assistant, I am now reading. Each said, "No."

Then Mr. Miller asked if they did not have some men in their department to whom they would turn to at times to act in their absence.

The names of Carm Reese and Lundy Groves were mentioned as having at one time or another managed the department for their foreman during temporary periods.

Mr. Miller then stated that these two men and Harry White, the only foreman we were unable to have present at the meeting, were active in organizing the Richwood Clothespin and Dish Workers Union.

Now, we appealed several times to Mr. Miller to call in the Independent people and interview them, but he refused to do that.

Mr. Chubb: Mr. Christmas——

Trial Examiner Spencer: I might state also, I do not think it has any bearing on this case whatever, that I do not think it is the usual practice of the Board to interview the employees in the presence of the employer. I just make [fol. 921] that observation. I do not think there is anything unorthodox in Mr. Miller's attitude on this particular point.

The Witness: We asked him——

Trial Examiner Spencer: I say, I do not think it has anything to do with the case whatever that you wanted him to interview the foremen.

The Witness: I want to say that we asked him to see them separately.

Mr. Chubb: May we pause just a minute. I want to see about an exhibit here.

May I interrupt you a moment, Mr. Christmas, to show you Respondent Wallace's Exhibit No. 14, which is a letter from the National Labor Relations Board, November third, and ask you if you had personally seen that letter prior to this conference with Mr. Miller?

A. Yes, sir, I received this letter.

Q. That is the request for the Richwood union certification.

Mr. Shroyer: Yes, sir that is already in evidence.

Mr. Chubb: That is already in evidence. Go ahead.

The Witness: I received a telegram from Mr. Davis, the plant manager, in Richwood, dated November 13, 1941, advising me that Mr. Phillips of the Labor Board had called a conference, or wanted to have a meeting in Charleston of all the parties concerned here in this discussion, and I wired Mr. Davis telling him that we would be glad to go, and later on he wired me again and told me that the con-[fol. 922] ference had been called off. Of course, this conference never occurred.

And my next direct——

Q. Just a moment, Mr. Christmas, following that meeting with Mr. Miller in Richwood, did you return to St. Louis?

A. Yes, I did.

Q. Do you recollect having anything to do with a letter written from St. Louis to Mr. Phillips about that conference?

A. Yes.

Q. You saw it personally?

A. Yes.

Q. Was that in the nature of a report at that time about the conference?

A. Yes, it was, a report that we made to Mr. Phillips of our views concerning the conference.

M. Chubb: Mark that, please.

(Thereupon, the document referred to was marked for identification Respondent Wallace's Exhibit No. 17.)

Trial Examiner Spencer: Mr. Chubb, I assume that you are developing this line of inquiry intending to show the difficulties of the Respondent Wallace. Is that your purpose?

Mr. Chubb: That is correct, sir. This is off the record.

Trial Examiner Spencer: This is off the record, if you would like.

[fol. 923] Mr. Chubb: Yes.

Trial Examiner Spencer: Off the record.

(Discussion off the record.)

Trial Examiner Spencer: On the record.

By Mr. Chubb:

Q. Mr. Christmas, I am showing you the paper that has been marked here as the Respondent Wallace's Exhibit No. 17, is that the letter to which you have reference and which you participated in preparing?

A. Yes, it is.

Q. That was sent to Mr. Phillips?

A. Yes, sir.

Q. Now, I will show you Exhibit 18 of the Respondent Wallace and ask you if that is the reply that you received from Mr. Phillips?

A. Yes, it is.

(Thereupon, the document referred to was marked for identification Respondent Wallace's Exhibit No. 18.)

Mr. Chubb: I will offer these in evidence, if I may, Your Honor.

Trial Examiner Spencer: Is there an objection?

Mr. Shroyer: No.

Trial Examiner Spencer: I hear no objection. I will receive Respondent Wallace's Exhibit 17.

Mr. Chubb: And 18.

Trial Examiner Spencer: And 18.

. . . . . .

[fol. 924] A. The next direct contact with the situation here in Richwood that I had was early in January, Mr. Wallace and I came down with the intention of finding out first-hand just what the situation was.

Trial Examiner Spencer: By coming down, you mean?

The Witness: To Richwood, from St. Louis. That meeting resulted in reaching an agreement on the night of the day of the twelfth of January, and on the morning of the thirteenth to go back to work and hold an election under

the supervision of the Labor Board; and the plant reopened on the morning of January the thirteenth.

All employees were invited to come back and a good number of them did.

And about a week later——

Mr. Chubb: Just a second. Was that the occasion when the representatives of the Independent came to Mr. Davis' house to discuss the question of a settlement?

[fol. 925] Mr. Shoyer: Was Mr. Christmas present?

The Witness: I would like——

Mr. Chubb: I will ask him if he was.

The Witness: Yes, I was.

By Mr. Chubb:

Q. Do you remember the conference in question?

Trial Examiner Spencer: When you say "this occasion", I do not think you have yet specified the date.

Mr. Chubb: January the thirteenth, was it?

The Witness: January the twelfth and thirteenth, this ran from one day into the next.

By Mr. Chubb:

Q. The night of the twelfth and the morning of the thirteenth?

A. And the afternoon of the thirteenth.

Mr. Chubb: I am sorry I did not stop and try to correct this thing.

By Mr. Chubb:

Q. Were you present at Mr. Davis' house that evening, were you?

A. Yes, I was.

Q. And do you recollect a delegation or committee from the Independent union coming to his house?

A. Yes, I do.

Q. Now, what did they present to you at that time?

A. Well, they had just left a meeting with the CIO committee.

Q. Do you know where that meeting was held.

[fol. 926] A. I understood it was held in the office of Mr. Marshall in Richwood.

Q. All right.

A. Then following, they came up from that meeting.

Q. Go ahead.

A. Well, they called first to find out if they could come up. They came up to Mr. Davis' Office—I am talking now about the committee from the Independent union to tell us what had happened at this meeting and to ask us to either confirm or deny any statement that had been made by the CIO committee. I remember one of them was that the company had said that it was quite agreeable to them if the Independent dropped out of the election.

Well, the company had not made any such statement and repeatedly told them the same as we told others, that the company had no fixed advice to either one of them what to do, they would have to use their own judgment.

Q. Well, that meeting went on into the small hours, did it?

A. Well, later, on, after they left, Mr. Farmer's committee came up to see us, and I believe, if my memory is correct, at that time we reached some basis on which we thought that we could agree all around, and we called the committee together, and later on adjourned over to our office and finally got an agreement worked out at three-thirty or four o'clock in the morning.

[fol. 927] Q. That is the agreement that is in evidence here?

A. Yes, sir, that is the agreement.

Q. And you returned to St. Louis?

A. Well, we stayed in Richwood for a couple of days afterwards, the plant had been down so long, and there was quite a lot of trouble in getting started right, machinery, and pipes, and what not.

Q. Mr. Christmas, do you have any knowledge of some telegrams which were exchanged between you and Mr. Phillips about some message that Mr. Wallace had sent to B. E. Thompson. Do you have any knowledge about those telegrams?

A. Yes, I do.

Q. Where were you when you first heard from Mr. Phillips about this matter?

A. We were in St. Louis. The first telegram that we had, or call, I believe it was a telephone call first from Mr. Phillips.

Q. Phillips was complaining of some action on your part?

A. Yes.

Q. Your telegram, which is in evidence, about your special request, that was Mr. Phillips' request?

A. Yes, sir, that is right.

Q. What did you do?

A. We sent a second telegram to Mr. Thompson and asked him to give it equal publicity as to the first one.

[fol. 928] Q. Did you hear again from Mr. Phillips?

A. Yes, I think Mr. Wallace and I left in the meantime for the Warsaw factory, and we were enroute there, we had to stop in Chicago and Milwaukee on the way, we were on the train each night, two nights, so the message that we had from Mr. Phillips was forwarded from the St. Louis office and we did not get it until we arrived in Warsaw.

Q. To whom was the telegram addressed which you sent at Mr. Phillips' request?

A. B. E. Thompson.

Q. The subsequent messages from Mr. Phillips had to do with posting that telegram?

A. Yes, sir, they did.

Q. Well, briefly, he stated that he heard it had not been posted by the company?

A. That is right.

Q. What did you do about it?

A. And I wired Mr. Davis to go over to Mr. Thompson's office and get a copy of that second telegram and take it back to our plant and post it on the bulletin board.

Q. That isn't the message in evidence, is it?

A. Yes, sir.

Q. That Mr. Davis testified about.

A. Yes, sir.

Q. Did you report to Mr. Phillips what you had done?

[fol. 929] A. Yes, I telephoned, I believe, from Warsaw.

Q. Were you present when that telegram was sent?

A. I wrote the telegram, in fact.

Mr. Chubb: Will you mark these, Mr. Reporter, three copies of each.

(Thereupon, the documents referred to were marked for identification Respondent Wallace's Exhibits Nos. 19 and 20.)

By Mr. Chubb:

Q. Mr. Christmas, I hand you a telegram, or copy of a telegram, which is dated Warsaw, Wisconsin, January 27, marked Exhibit No. 19 of the Respondent Wallace, and a letter from Mr. Phillips, dated January 20, marked Exhibit 20 of Respondent Wallace, and ask your if you can identify those?

A. Yes, I can.

Q. What are they, please; just state briefly?

A. Well, the telegram is addressed to Mr. Phillip G. Phillips of the NLRB in Cincinnati, from Warsaw, Wisconsin, signed by M. B. Wallace, Jr., telling Mr. Phillips that——

Q. Well, you do not need to tell what is in it.

A. All right.

Q. What is the other one?

A. The other one is a letter from Mr. Phillips thanking us for our telegram of January 22nd, that is, this same telegram.

Mr. Chubb: I will offer in evidence, if I may, the Respondent's Exhibits 19 and 20.

[fol. 930] Mr. Chubb: Mr. Christmas, I am going to hand you now a letter which is marked Respondent Wallace Exhibit No. 8, and ask you if you have seen that letter before?

A. Yes, I have.

Q. Just state, very briefly, the circumstances leading up to that letter, how it happened that you got it?

A. Well, this letter was written to me by Mr. Thompson, business agent of the Independent union, as a result of some telephone calls that I had—that we had with him objecting to the inclusion in this contract that we were negotiating on of the closed shop clause. That is largely what this letter is about. Mr. Thompson in this letter states his union's position in regard to a closed shop. It also points out that it must be included in the contract.

Q. Yes. When did you start negotiating with the Independent or on the agreement if you remember?

A. Well, I don't remember the exact date; there was a period of a week or two after the election where the union was not quite ready to start negotiations, the company was [fol. 931] at any time, but we had not heard from them for some short period of time.

Q. And for how long did those negotiations continue?

A. The contract was finally signed on March the seventh; I will say the negotiations went on for a month.

Q. Now, following the signing of the contract with the Independent, did you have any contact with the Independent representative about that matter of lay-off of ineligible employees?

A. Yes, I did.

Q. Where was it, and when?

A. It was at White Sulphur, West Virginia. I had to go to New York, and I telephoned both Mr. Davis and Mr. Thompson and asked them to meet me in White Sulphur. I suggested to Mr. Thompson he might bring a committee of his union along. My purpose in doing that was to talk about this further wage increase and the subject of the possible raises that we were in the process of discussing at the time, or had just started to, and I also wanted to talk to the union about this closed shop clause.

Q. Now, Mr. Christmas, is that before the seventeenth of March, if you know?

A. Yes, it was.

Q. So it was between the time the contract was signed, and the seventeenth when the lay-off occurred?

[fol. 932] A. It was about the eighth or ninth of March.

Q. Did you have any information at that time as to how many employees might fail of election to the Independent?

A. No, sir, I had no information as to how many.

Q. Were you here on the seventeenth when the layoff took place?

A. No, sir.

Q. Did you subsequently see the letter from Mr. Phillips about the charges on that lay-off?

A. Well, I might say that the meeting in White Sulphur, Mr. Thompson came up there and he did not bring any of his committee, but he said——

Q. You are not answering my question, but I take it there is no objection. Do you want to proceed?

A. Well, you asked about this letter. One of the main reasons that I wanted to talk to this union committee was to try to persuade them to not be too vindictive in laying off people for refusing membership, because I knew from my contact that there was a very strong feeling, and I asked Mr. Thompson to appeal to his union. I told him that I realized that the company had no right to tell them who to

select as a member, but told them not to abuse the privileges that they had had under that closed shop clause, and he told me that he would.

Q. Was the letter which you received from the Labor Board about this charge the one that is in evidence here [fol. 933] as Exhibit 9, our Exhibit 9.

A. I can't tell without looking at it.

Q. I will show you, Mr. Christmas, the paper that has been marked Respondent Wallace's Exhibit 9, and ask you if you received that letter?

A. This is a letter, Mr. Chubb, addressed to Mr. B. E. Thompson.

Q. Well then, it is not the right one. Wait a minute. You are quite right. Did you have anything to do with writing that letter?

A. Well, I assisted in writing it, this is Mr. Wallace's letter.

Q. Refers to the fact that I went down to—that I was to go down to Cincinnati. Do you know if I actually went?

A. Yes, sir; you did.

Q. Well, you know, Mr. Christmas, don't you, that if there was a letter about that date to the company complaining of the discharge of these people.

A. Yes, I do know that there was such a letter.

Trial Examiner Spencer: That is a letter from Mr. Phillips?

The Witness: A letter from Mr. Phillips, yes, sir.

Mr. Chubb: How?

The Witness: A letter from Mr. Phillips.

[fol. 934] Mr. Chubb: Mark number 21.

(Thereupon, the document referred to was marked for identification Respondent Wallace's Exhibit No. 21.)

By Mr. Chubb:

Q. Handing you Respondent Wallace's Exhibit No. 21, is that the letter you received from Mr. Phillips?

A. Yes, this is the letter from Mr. Phillips notifying us of the charge having been filed.

Q. That was addressed to you at the Richwood office?

A. Yes, and reforwarded to St. Louis.

Mr. Chubb: I will offer this, Respondent's Exhibit 21, in evidence.

Mr. Shroyer: No objection.

Mr. Chubb: May we go off the record?

Trial Examiner Spencer: Respondent's Exhibit 21 will be received.

(Thereupon, the document heretofore marked for identification Respondent Wallace's Exhibit No. 21 was received in evidence.)

Mr. Chubb: May we go off the record now?

Trial Examiner Spencer: Yes.

(Discussion off the record.)

Trial Examiner Spencer: On the record.

Mr. Chubb: Will you mark these, Mr. Reporter?

(Thereupon, the documents referred to were marked for identification Respondent Wallace's Exhibit Nos. 22 to 29, both inclusive.)

[fols. 935-937] Mr. Chubb: Mr. Christmas, the letter of March the twentieth, being the complaint from the Labor Board about this lay-off was referred to me, was it not?

A. Yes, sir, that is right.

Mr. Chubb: Mr. Examiner, I would like to make the statement that following the telephone call from Mr. Phillips I went to Cincinnati, Ohio, and met in Mr. Phillips' office with Mr. Thompson and Mr. Ritchie, that being the first time I had ever made the acquaintance of either of them, and that we discussed the possibilities of getting these people back to work and that Mr. Ritchie and Mr. Thompson indicated that they would see what could be done. I do not think I am justified in saying any more definitely than that.

I received from Mr. Phillips personally, under date of March 21, a letter containing a copy of the letter of the same date to Mr. Thompson from Mr. Phillips, and I would like to introduce that in evidence as Respondent Wallace's Exhibit 29.

. . . . . .

[fol. 938] Mr. Chubb: I would like to make an offer, if I may, at this time.

I would like to offer in evidence at this time, the letters marked Respondent's Exhibits 29, 27, 26—I am offering

them as they are marked, backwards—25, 24, 23 and 22, limiting the offer, as I said before, that the correspondence is offered to show the reasons assigned and the efforts made in the period following the lay-offs for the continued unemployment of these people.

I am perfectly willing for the Examiner to disregard such part of those letters as is a matter of argument although I think it is not prejudicial in any way.

I might say that if there is any other part of the correspondence which I had with Mr. Phillips that Mr. Phillips desires or that Mr. Shroyer desires to place in evidence I should be glad to stipulate in evidence at any time.

. . . . . .

[fol. 939] Trial Examiner Spencer: Mr. Shroyer, do you oppose the offer?

Mr. Shroyer: May I make a statement?

Trial Examiner Spencer: Yes.

Mr. Shroyer: In view of the fact that we already have in evidence a considerable amount of correspondence between the parties, I have decided to withdraw my objection to the admission of any further correspondence.

Trial Examiner Spencer: Very well, there is no objection. The offer of the Respondent Wallace is then received in evidence within the scope of the offer.

(Thereupon, the documents heretofore marked for identification Respondent Wallace's Exhibits 29, 27, 26, 25, 24, 23 and 22 were received in evidence.)

Mr. Chubb: Mr. Examiner, I was embarrassed, as attorneys I think always are in having had to make a state-
[fol. 940] ment for the record, and I am glad to be subjected to any questions that Mr. Shroyer wishes to ask me in regard to my statement, or I would be glad to go under oath.

Mr. Shroyer: I have no questions to ask that would be relevant.

By Mr. Chubb:

Q. Mr. Christmas, I think you had completed your statement. Is there anything that you wish to add at this time?

A. No, I can't think of anything further.

Mr. Chubb: You may inquire, Mr. Shroyer.
Trial Examiner Spencer: Mr. Ritchie?
Mr. Ritchie: Just a few questions.

Cross-examination.

By Mr. Ritchie:

Q. Did you or anyone connected with the company or anyone acting for or on behalf of the company, so far as you know, have anything to do with the organization and maintenance of the Independent union at the Richwood plant?

A. No, sir, I know of no one connected with the company, I am quite sure about myself.

Q. Did you or anyone connected with the company or acting for or on behalf of the company have anything to do with the publication and preparation of the editorials in the Nicholas Republican that have been introduced in evi- [fols. 941-945] dence in this case?

A. No, we did not; I did not.

Q. Did you or anyone connected with the company have anything to do with Mr. Thompson's activities as the business agent of the Independent?

A. We did not; I did not.

Q. Did you or anyone connected with the company or anyone acting for or on behalf of the company, so far as you know, do anything that was designed or tended to influence the result of the Labor Board election held at Richwood, for the employees of The Wallace Corporation?

A. No, we did not.

. . . . . .

Q. I believe that was the first time that has come out. You had determined to open the plant the next morning?

A. Yes, that is what started the conference that day.

Q. Regardless of the strike or not, picket line or not. — [fol. 947] A. We were going to open the plant and everyone that wanted to come back to work was invited to come back and work in the morning.

Q. Did you tell the Independent people that at the time?

A. Well, the statement was first made at a meeting of a number of business people in he Mayor's office, I believe, there at Richwood.

Q. Did you attend that meeting?

A. Yes, I attended it.

Q. What statement was made?

A. Well, Mr. Wallace and I came down here at that time to get first-hand information on what the situation was; the plant had been closed for about fifteen weeks, and it was a question of just what, we had to do something, we were about to lose all of our customers, it was a question of can we open or just shut down and reduce expenses to a minimum and let the thing roll on for a while.

Q. Yes.

A. And as a part of that investigation we, with everyone who wanted to come in, with the Chamber of Commerce, the Federation in Richwood, in regard to the feeling of the town.

Trial Examiner Spencer: What do you mean by the Federation?

The Witness: I believe they call it the Richwood Federation, which is also the Chamber of Commerce.

[fols. 948-950] Trial Examiner Spencer: Is it the same?

The Witness: It is the same as the Chamber of Commerce, yes, sir.

And the result of that discussion was that it was very important that practically everyone was very anxious for the company to reopen.

. . . . . .

[fol. 951] Q. Did you have anything personally to do with the negotiation of the contract or working agreement between The Wallace Company and the Independent?

A. Did I have anything to do with it?

Q. Yes.

A. Well, not on the ground here in Richwood, but there were several proposed agreements sent up to the St. Louis office for approval.

Q. Who handled that for you in Richwood?

A. Mr. Davis for the company.

Q. Well, were you familiar with the various drafts that [fol. 952] did come to you in St. Louis?

A. Yes, I saw all of them.

Q. And as I understand it, these drafts were turned down on the part of the company?

A. Well, there were some portions, to the best of my recollection there was only really one that was rewritten, there may have been two.

Q. Do you remember what that one was?

A. Well, how do you mean?

Q. You said that it is your recollection that there is one that was different.

A. Well, there was one that was sent up that was revised in St. Louis and sent back to Davis.

Q. Well, what was that one?

A. You mean, all the provisions of it, I could not recall all of them.

Q. Perhaps I misunderstood you. I understood it from your testimony that there was just one sent that was in dispute.

A. Oh, no, no, one draft of about ten or twelve pages.

Q. I see.

A. And there wasn't one clause, there were several clauses that we were not in agreement on to begin with at all.

Q. Do you know to what extent that contract has been carried out?

A. So far as I know it has been carried out entirely, in [fol. 953] its entirety, 100 per cent.

Q. With reference to toilet facilities and those things that are a part of the contract?

A. Well, there are, of course, some things such as the toilet facilities which have been delayed to some extent by our inability to get supplies, materials with which to work, but I know that Mr. Davis was instructed by the office in St. Louis to proceed as quickly as possible to complete whatever necessary changes were needed down there.

Q. Have there been any bargaining conferences since the contract was signed in which you took part?

A. Yes, there have been a number of conferences between the company and the people in the factory since then.

Q. Is that all with reference to this lay-off of 43 men that you have already testified to?

A. No, I would not say that it was. There were conferences concerning the carrying out of one of the clauses of the contract in regard to wage scales, rates; there were several conferences on that down there; and there have been conferences on seniority, a committee was set up on

that, but I personally have not attended any of those conferences.

Q. That is all done by Mr. Davis?

A. Yes.

Q. All you know about that is what Mr. Davis told you?

A. What he has reported to me.

[fol. 954] Mr. Shroyer: That is all.

Trial Examiner Spencer: Mr. Christmas, you have testified that prior to the actual agreement between the company and the Independent there was a proposal submitted, do you recall whether that prior proposal you referred to had a closed shop or union shop clause in it?

The Witness: Yes, sir; the very first one had a closed shop in it.

Trial Examiner Spencer: Will you state, if it is *is* within your knowledge, what the attitude of the company was toward the closed shop or union shop clause.

The Witness: Well, the company's attitude from the very beginning in any discussion with the union was opposed to a closed shop. In fact, at the meeting on the night of January twelfth—thirteen, where we reached this agreement to go back to work, a large part of the evening was discussing what a union shop was and what a closed shop was.

Trial Examiner Spencer: Now, passing from this conference to the negotiations between the Independent and the Respondent Wallace, was there controversy over the closed shop or union shop clause?

The Witness: Yes, sir, that was one of the principal reasons why we objected to the first proposal that was sent to us, that and the wage question clause, that they had in it.

[fol. 955] Trial Examiner Spencer: In rejecting the first draft you stated to the Independent that was one of your main reasons for rejecting it?

The Witness: Yes sir.

Trial Examiner Spencer: Did you oppose it thereafter?

The Witness: How is that?

Trial Examiner Spencer: Was there any further opposition to this union or closed shop agreement expressed by the company?

The Witness: Yes, there were quite a number of occasions, there was quite a little of telephoning, quite a lot of telephoning back and forth and other conferences, meetings with Mr. Davis here and there.

Trial Examiner Spencer: Was there any discussion prior to the signing of the agreement that would tend to indicate that the Independent might reject certain employees as members of that organization?

The Witness: Prior to the signing of the agreement?

Trial Examiner Spencer: Yes.

The Witness: No, I do not recall any prior to the signing of the agreement.

Trial Examiner Spencer: You mean there was no indication in any of the conferences that such might develop?

The Witness: Not that I know of; no, sir.

Trial Examiner Spencer: Well now, at the time you [fol. 956] signed this agreement, your company, the Respondent Wallace, signed this agreement with the Independent, had that occurred to you as a possible development?

The Witness: Well, of course, that was one of the reasons why I would oppose the union shop, I mean a closed shop, that it might give an opportunity for a certain unfairness in connection with it.

Trial Examiner Spencer: You mean by that it is your understanding of this closed or union shop clause that it permitted the union to reject certain employees as members?

The Witness: The clause as it is written in the contract?

Trial Examiner Spencer: Yes.

The Witness: At the present time I understand it does give them that right.

Trial Examiner Spencer: It was your understanding at the time the contract was made?

The Witness: We signed the contract, the contract was signed, yes, sir.

[fol. 957] Redirect examination.

[fol. 958] By Mr. Chubb:

Q. Mr. Christmas, the Examiner asked you about the attitude of the company to the closed shop. How early, if you recollect it, was the issue of the closed shop and no closed shop, how early did that come up in the course of the strife?

A. Well, the earliest that I can recall the question of the closed shop coming up was a telegram from Mr. Titler in

[fol. 959] which he made some offer to settle if we would agree to a closed shop.

Q. Is that the telegram which I now hand you marked Respondent's Exhibit 6?

A. Yes, that is it.

Q. Now, in the negotiations——

Mr. Shroyer: Let me see it.

By Mr. Chubb:

Q. In the negotiations which you had on the night of the 12th, the morning of the 13th of January, did the Independent Union representative of the CIO representative, or both, insist on a closed shop; or neither, make it a fair question?

A. My recollection is that that was the point on which we had a lot of discussion during the evening. The CIO representatives wanted the right to confine it in such a way that it would be a closed shop.

Q. Do you recollect—the Examiner asked you whether there was indicated the exclusion of specific employees in the event of a closed shop agreement, any specific insistence on the part of the CIO or the Independent Union about the closed shop.

Trial Examiner Spencer: You are referring to the clause in the supplemental agreement between the—or, in the contract between the Independent Union and the Respondent?

Mr. Chubb: The supplemental agreement on the 13th. [fol. 960] What I am trying to get at is what was the source of the insistence on that clause?

A. Well, that was the CIO insistence on it.

Q. Well now, did the Independent Union also want that clause?

A. No, not as far as I know, they did not.

Q. You do not remember their insistence on it?

A. No, sir, I do not.

Q. Well when did that question come up, when did they begin to be so insistent about a closed shop clause?

A. At the time they started to negotiate this contract with us

Q. Did you then learn from them any specific employees that they had in mind to exclude?

A. No, sir, I did not.

Q. You were not out in Richwood when the lay-off took place, Mr. Christmas?

A. No, I was not.

Q. You did not know about the circumstances there?

A. No.

Mr. Chubb: I think that is all.

Trial Examiner Spencer: Mr. Ritchie.

Mr. Ritchie: One question.

Recross-examination.

By Mr. Ritchie:

Q. Mr. Christmas, if I understand your testimony correctly, due to the light of certain exceptions that have been [fol. 961] filed, the company made an extended and strenuous effort to induce the Independent Union to take such steps as might be necessary to put back to work those who had been laid off on account of the union shop agreement, is that correct?

A. Yes, we did make such an effort.

Q. And that effort was unavailing?

A. That is correct; yes, sir. It may have been availing to some extent, because I know that, according to the testimony here, some of the CIO members are now working in our plant.

Q. Well, it was unavailing, however, as to certain employees who have been listed in this complaint?

A. Yes, sir.

Q. And I understand that that appeal was made directly to the officials and members of the Independent?

A. Yes, sir.

Mr. Ritchie: That is all.

Trial Examiner Spencer: Mr. Ritchie, the point I have in mind, and I will ask the question now, whether or not the company considered that by the signing of the contract between the company and the Independent, that the Independent was obligated to receive as members employees within the unit described; I want to know whether that was the company's understanding of the contract or whether it was not.

The Witness: They were obligated to take as members [fol. 962] all of the employees of the company?

Trial Examiner Spencer: Set out in the unit.

Mr. Chubb: I do not understand the question, myself, Mr. Examiner.

Mr. Shroyer: I wonder if you would ask the witness to look at that portion of the contract to help him.

Mr. Ritchie: I think the witness has already answered the question.

Trial Examiner Spencer: I think that he has, but I wasn't sure that he understood my question when he answered before.

The Witness: It was my understanding of this agreement that after the 10-day waiting period everyone working in the jobs specified here as being eligible to union membership would have to be members of the union.

Trial Examiner Spencer: Yes. Now, my question was, was it the understanding of the company or was it not that that imposed an obligation on the union to receive them as members?

The Witness: To receive anyone whom the company might wish to hire.

Trial Examiner Spencer: No, no; anyone whom the company might include within the unit, the unit that is set out in the agreement.

The Witness: I do not recall any understanding as to that.

[fols. 963-964] Trial Examiner Spencer: There was no discussion as to that?

The Witness: No, sir; not so far as I know there was none had with me.

Trial Examiner Spencer: Well then, your answer is that that was not the understanding?

The Witness: No, sir.

Mr. Ritchie: May I ask a question?

Trial Examiner Spencer: Well, I interrupted you.

By Mr. Ritchie:

Q. I understood you to say, Mr. Christmas, that one of the objections that you had to the union shop provision was that it would give the organization the power to keep out men who were employees and whom you might want to re-hire?

A. That is correct: Yes, sir.

Q. Well, in reaching that conclusion, was it your position or thought that the matter of taking in members was a matter solely in the hands of the union?

A. That is correct; that is what I understood the contract to mean.

Q. And that the union had the right to stop or exclude any persons whom they desired, had the right to accept or exclude any persons whom they desired to accept or exclude?

A. That is what I understood.

[fol. 965] Mahlon B. Wallace, Jr., was called as a witness by and on behalf of the Respondent, The Wallace Corporation, and being first duly sworn by the Trial Examiner, testified as follows:

Direct examination.

By Mr. Chubb:

Q. Will you state your name, please?

A. Mahlon B. Wallace, Jr.

Q. Where do you live?

A. St. Louis, Missouri.

Q. You are president of The Wallace Corporation?

A. Yes, sir.

Q. Operating the Richwood Plant?

A. Yes, sir.

Q. How long have you been president, Mr. Wallace?

A. Since 1930; it may have been the latter part of 1929, or 1930.

[fol. 966] Q. There has been a change in the company name, has there, Mr. Wallace, in the last few years?

A. Yes, sir.

Q. From Steele-Wallace Corporation to The Wallace Corporation?

A. Yes, sir.

Q. That change in name meaning ~~change~~ in the interest and ownership of the company?

A. Yes, sir.

Q. Will you state, or is it a fact, and I am leading at this point since I think that will obviate many questions and will abbreviate the record, the Steele-Wallace Corporation and

The Wallace Corporation ownership is entirely in the Wallace family?

A. The Steele-Wallace was entirely in the Wallace family, The Wallace Corporation is entirely in mine.

Q. Will you state what the present capitalization of The Wallace Corporation represents?

A. I do not understand that question.

Q. Did you make advances to the company, The Wallace Corporation?

A. The stock of The Wallace Corporation represents advances made by me personally to the Steele-Wallace Corporation prior to the reorganization.

Q. Do you care to state to the Examiner whether or not there have been any profits made out of this company in the [fol. 967] last six or seven years?

A. There has been no profit made since 1931.

Q. Now, who is the manager of the Richwood Plant?

A. Mr. A. F. Davis.

Q. Do you have other plants?

A. Yes, sir.

Q. Where are they?

A. Wausau, Wisconsin and Escanaba, Michigan.

Q. The Escanaba Plant has been shut down for some time?

A. Yes, sir.

Q. And recently sold, since this matter came up?

A. Yes, sir.

Q. You are familiar generally with the facts regarding the strike at the Richwood Plant?

A. Generally; yes, sir.

Q. What labor organization was the first to approach your company regarding collective bargaining down at the Richwood Plant?

A. It was signed, the letter was signed by Mr. Titler and it is some construction—United Construction Workers of America, I believe.

Q. The CIO?

A. In other words, a CIO affiliate.

Mr. Chubb: I might say that in this hearing we have customarily referred to it as the CIO.

[fol. 968] The Witness: I think it was the United Construction Workers.

By Mr. Chubb:

Q. It was the United Construction Workers Organizing Committee?

A. I believe so, and what clothes pin have to do with that, I don't know.

Q. Now, when did you say that you first heard from them, approximately?

A. Approximately the middle of September.

Q. What position did you take, if you took a position, regarding collective bargaining for the Richwood Plant at that time?

A. I recognized the inevitability of it and was perfectly agreeable to bargain collectively with any union that could prove to me a majority.

Q. Did you have a disagreement with the CIO and, if so, what was the source of that disagreement?

A. I was offered three methods of determining whether or not they had a majority. One was a card count; one was a Labor Board election; one was three gentlemen of the cloth, in other words, a Catholic priest and a Methodist and a Presbyterian to find out as an independent jury the choice of the employees. I chose the Labor Board election.

Q. Was there any question at that time about another labor union being involved?

[fol. 969] A. No, sir.

Q. Now, as I gather, there was a disagreement arose over the method of determining a majority?

A. Method of determining the majority.

Q. They never did agree to the Labor Board election, or did they?

A. No, they never did.

Q. Now, did you have any discussion with the plant manager, Mr. Davis, about what position he should take about this matter of labor organization at your plant?

A. Yes.

Q. Whereabouts did you discuss that relation?

A. Harbor Springs, Michigan, my summer home.

Q. Without going into detail, was that quite a long discussion with him?

A. Two days.

Q. Without going into detail, just briefly what was the position you took, and what were the instructions you gave him?

A. That we would be perfectly willing to recognize any union if it was proved to have a majority in our plant; that we would not operate under a closed shop agreement but would operate under a union shop.

Q. Now you were not present, as I understand it, at the negotiations prior to the strike down here in Richwood?

[fol. 970] A. No, sir.

Q. Did you hear from any representative of either union by phone during that time?

A. Yes, sir.

Q. Who was that?

A. Mr. Farmer.

Q. Do you remember the date, with reference to the strike?

A. I do not know that I remember it exactly, but it was around the 25th of September. The strike was called for the 25th; therefore, it must have been a day or two before that.

Q. What did Mr. Farmer have to say?

A. Mr. Farmer said that they would not hold a Labor Board election under any circumstances and that they would prefer charges against us in front of the Labor Board and that the plant would be shut down until those charges were heard or dismissed, and he informed me that at 2 o'clock that afternoon my plant would be shut down.

Q. What did you say to that?

A. I said that I was sorry to hear it but if that was what they were going to do, that is what they would do, and as a matter of fact it was a little bit before two when they shut it down.

Q. You were not here, Mr. Wallace?

A. Sir?

Q. You were not here at the time?

[fol. 971] A. No, I was at home.

Q. Now, when did you next have any contact personally with the representative of the labor union, the CIO?

A. Personally?

Q. Yes.

A. My next contact with them was when I met Mr. Miller of the Labor Board, I think he is called an investigator.

Q. Whereabouts did you meet him?

A. At my office in Richwood, West Virginia.

Q. Just state briefly what occurred

A. Mr. Phillips asked me to meet Mr. Miller and assured me that Mr. Miller was going to make a thorough investigation and that we could settle the entire thing at our plant in West Virginia. Mr. Christmas and I went down there; Mr. Farmer was there. Our meeting was for, I think about 2:00 o'clock, right after lunch in the afternoon.

Q. Do you know—at that point—do you know whether Mr. Miller had been in Richwood very long prior to 2 o'clock that day?

A. After first meeting Mr. Miller, he informed me that he just come in with Mr. Titler and Mr. Farmer.

Q. Go ahead.

A. And there was another gentleman; Mr. Farmer, what is his name?

Mr. Farmer: Gallagher.

[fol. 972] The Witness: Gallagher, that is the gentleman.

Mr. Chubb: All right; very briefly, Mr. Wallace.

The Witness: Right after the introductions I turned the meeting over to Mr. Miller because I was totally unfamiliar with this sort of thing and within five minutes he informed me that the Independent Union was company-dominated and that he had made up his mind on it. I asked him if he had talked to the town people. He said no. I asked him if he talked to the Independent Union. He said no. I asked where he got his information. He said on his way down from Charleston with Mr. Farmer, Mr. Gallagher and Mr. Titler.

So there wasn't much more that I could do, but I asked him to reconsider and meet me again the next morning. I asked him to do that.

Q. What did he say to that?

A. He said he could not do it, he was going back to Charleston that night.

Q. What next contact did you have with the situation, Mr. Wallace, did you return to St. Louis following that?

A. Left immediately that evening.

Q. And what was your next contact with the labor situation down here, personal contact, I suppose you had telephone calls from time to time?

A. Oh yes, I had quite a few of those.

My next personal contact was about January 12th, I went [fol. 973] down there with the idea of either opening the

plant up or making up my mind to leave it closed permanently, we had lost two or three of our large accounts, business was suffering, and it was a question of open up or stay shut. And after talking to the Independent group, who apparently wanted to work and to the townspeople, I decided to open up and so issued an order to open up on the 13th of January. I remember that day.

Q. Did you have any interviews with the CIO people about opening up?

A. Mr. Marshall, of Richwood, called me at my office after I had decided to open up and said that the CIO delegation would like to have a conference with me.

Q. And what did you tell them?

A. I told them I would be delighted to see them and they came to the office.

Q. That was in the afternoon?

A. Yes, sir.

Q. Well, without going through all the details, what was the outcome of that?

A. An agreement, which was signed by the CIO, the Independent and the company.

Q. Do you have any recollection of meeting a delegation, also of the Independent Union, coming up to see you, up at Mr. Davis' house that evening?

[fol. 974] A. Yes, right after Mr. Miller left.

Q. What was the purpose of their coming up there?

A. To present their claims as sole bargaining agent, the same as the CIO had done before.

Q. What time of the day did that meeting take place, if you remember?

A. To the best of my recollection, around 4 o'clock.

Q. Did they have any questions to ask of you?

A. I don't know that I understand. The only question that was brought up——

Q. I am talking about the 13th, or the 12th.

A. The only question that was brought up—oh, you are talking about the 13th?

Q. The day before the plant reopened.

A. Oh yes, yes, they said that I had made certain statements——

Trial Examiner Spencer: Excuse me, you are referring to a meeting attended by Miller?

Mr. Chubb: No, I am not talking about the Miller meeting, I am talking about this labor meeting.

The Witness: Yes, Mr. Marshall arranged a meeting of the Independent Union and the CIO, I think in his office, I am not sure, but anyway somewhere downtown and there were certain statements made, so the Independent people told me, that I had made, which they wanted clarified and [fol. 975] apparently it had broke up in a disagreement.

By Mr. Chubb:

Q. Can you be specific as to what statement you had been attributed to have used that bothered them?

A. Yes.

Q. What was it?

A. There was one statement I was supposed to have made to the effect that I had agreed with the CIO at my office that it was perfectly agreeable with me for the Independent Union, to scratch their name off the ballot and have a yes or no vote, the CIO or nothing.

Q. And what did you say to that?

A. Well, that was a deliberate falsehood.

Q. You had never made that statement?

A. I had never made it.

Trial Examiner Spencer: May we have who Mr. Marshall is, at this point?

The Witness: Sir?

Trial Examiner Spencer: You have referred to Mr. Marshall.

The Witness: Mr. Marshall is an insurance broker, I think, in Richwood, Mr. Spencer.

Mr. Chubb: Had you met him before?

The Witness: No, sir.

Mr. Chubb: Is that satisfactory, Mr. Spencer?

Trial Examiner Spencer: Is this the same Mr. Marshall that has been referred to in some part of the testimony as [fol. 976] president of the Federation in Richwood?

Mr. Chubb: I do not know; it seems to me there was testimony about that.

The Witness: I believe Mr. Marshall does belong to the Federation, I believe so, I am not certain.

Trial Examiner Spencer: I just wanted to know.

Mr. Chubb: I do not believe that the witness would know. I do not know myself.

Q. Was there any outcome of that conference with the Independent representatives that afternoon?

A. Do you mean now the early morning of the 13th?

Q. Well, whenever it was.

A. Yes, they referred to two other matters after being unable to reach an agreemnt with the CIO, and the order was still out to reopen the plant in the morning.

Q. What happened then?

A. Mr. Farmer called me up at Mr. Davis' and asked, he asked for a conference.

Q. Did you have it?

A. Yes, sir.

Q. After that?

A. The agreement was signed.

Q. The agreement?

A. Yes.

Q. Do you remember who was present representing the [fol. 977] CIO when they came up to Mr. Davis' house, do you have any recollection of the people?

A. I only have a recollection of about three of them. Let me see if I can remember, there was quite a group there, as I remember it, because the Independent came in later. There was Mr. Farmer, Mr. Estep, Mr. Dodrill and there were two young ladies, I don't remember their names.

Q. Do you remember whether there was a man called Goheen present?

A. Who?

Q. Goheen.

A. Yes, Mike Goheen was present.

Q. How soon after that did you leave Richwood?

A. That was the morning of the 13th. I think we left on the 14th.

Q. Was there any disturbance at all at the plant?

A. None whatsoever.

Q. What did you do next in the matter about this agreement?

A. Mr. Farmer hailed me on the main street of Richwood and said that he had arranged with the Labor Board to hold an election and they were sending a man down there and the next thing was a meeting in Mr. Phillips' office where the agreement that we had written was read by Mr. Phillips and the entire thing discussed and an election ordered.

Q. Mr. Wallace, there is a provision in the agreement of [fol. 978] January 13th about closed shop or union shop. Without too much detail, will you tell how that happened to be put in that agreement?

A. That was one of the things that took most of our time. Mr. Farmer insisted on that being put in and there was a great deal of discussion as to what a union shop and what a closed shop was. My understanding of it was that a union shop I could hire or fire; closed shop we had to go to the union for any employee we wanted.

Q. What about qualification for employment; did you get into that detail?

A. Not to my recollection that night.

Q. You did not?

A. No.

Trial Examiner Spencer: I am going at this point to ask this witness if it is your understanding, because in the previous testimony he stated that he instructed Mr. Davis that the plant would operate under the union shop but would not operate under a closed shop. So I would like to have—

The Witness: That is correct.

Trial Examiner Spencer: — the witness tell us just what is his understanding as to the difference between a union shop and a closed shop.

The Witness: My understanding of the difference there, and it was discussed quite freely that evening.

[fol. 979] Trial Examiner Spencer: If you don't mind, just refer back to the time that you instructed Davis and what your understanding was at that time.

The Witness: My understanding of the closed shop, that we had to go to the union every time we had need of an employee and ask them for one and didn't have the right to hire or fire.

Under the union shop, my understanding of the union shop, we could take people on and if they didn't later join the union they would automatically be out.

Does that explain my understanding?

Trial Examiner Spencer: If that is your understanding?

The Witness: That is my understanding of it.

Mr. Chubb: All right, sir.

Q. Now, what was the attitude in that conference of the Independent people towards the closed shop clause, if you remember?

A. That evening they apparently did not care, they wanted to go back to work.

Q. You returned to St. Louis after that and then I think you said you went down to Cincinnati and made this agreement?

A. That is correct.

Q. Now, were you in Richwood at any time subsequent to that, at the time of the election, and so forth?

A. No, sir.

[fol. 980] Q. Did you take any part in the negotiations for this contract with the Independent?

A. Only to check it over after it was submitted to us in St. Louis.

Q. What was the attitude of the Independent people at that time relative to this clause about closed or union shop?

A. Why; they were very much demanding it.

Q. Did you make an effort to have that modified?

A. Tried to have it kicked out altogether.

Q. And how long after you started negotiations on that contract with the Independent did you sign a contract with them, if you remember?

A. It must have been between two weeks and 30 days.

Q. And what was the cause of the delay?

A. We did not approve the first one and sent it back for correction.

Q. What items particularly stand out in your mind as the subject of disagreement?

A. The wage and hour provisions and the closed shop, union shop.

Q. Following the—I beg pardon, let me ask you this: During the negotiation of that contract and discussion of the proposed union shop clause, or closed shop, did you gain any impression that they had particular people that they wanted to exclude?

[fol. 981] A. It never occurred to me, never thought of it.

Q. When did you first hear of the exclusion, the laying off of these employees that are the subject of this present complaint?

A. That must have been—let's see, our election, I think, was held on the 19th.

Q. The 30th, Mr. Wallace.

A. It must have been the end of January, because there was a 5-day clause in there for the Labor Board to certify the union.

Q. I think you are confused. Do you remember the date of the contract with the Independent?

A. I think that was about the 30th, wasn't it?

Q. No, I think the contract was not negotiated until March. I am talking about the contract with the Independent.

A. Oh, oh, no. I honestly don't remember just what date I heard that they were not going to take these some 30-odd people back, but it was in March sometime. Now, let's see if I can bring that to my mind.

Q. What did you do about that when you first heard of it later on?

A. The first I knew of it, Mr. Phillips called me up in Cincinnati. That was my first knowledge of any man's layoff.

Q. What did you say there?

A. I told him I didn't believe it.

[fols. 982-985] Q. Did you confirm it?

A. I did, and found it was true, and called him back and told him so.

Q. And what effort did you then make in regard to them?

A. Well, I asked you to go to Cincinnati and talk to Mr. Phillips about it. I called Mr. Thompson on long distance phone, possibly wrote him a letter, asking him to reconsider.

Q. Do you know whether that was before you received notice of a complaint having been lodged with the Labor Board or after?

A. That was before.

Q. You think it was before the complaint?

A. I think so. You see the original complaints had been dismissed.

Q. Yes, I am talking about this present complaint about the layoff.

A. I am quite sure that this was before this complaint was lodged.

. . . . . .

[fol. 986] Q. Did you ever make a statement to Mr. Davis or to anybody connected with the company that you would never open the plant under a CIO union?

[fols. 987-988] A. No, sir.

Q. Did you ever say anything that could be interpreted as that that you know of?

A. The only statement that I ever made was that I did not think I would operate under a closed shop. That is the only statement that approaches it.

Q. Did you instruct Mr. Davis, prior to the strike when the thing came up, about what the attitude of the management would be towards labor organizations?

A. Perfectly willing to bargain collectively with any of them.

Q. Did you have it in mind at that time that you would want to go to some other location or did you take that position?

A. No, sir, it seemed that that was the wise and sensible thing to do. I think collective bargaining is a smart thing to do and I am for it.

Q. During the strike, did you ever make a statement or authorize the statement that any employee of The Wallace Corporation who failed to join the CIO would be taken care of by the company, or words to that effect?

A. Absolutely not.

. . . . . .

[fol. 989] Q. You also stated that after you received the letter from Mr. Phillips insisting that you take back the 42 employees who had been laid off that you again asked them to take these people back but got nowhere. Now, whom did you ask, did you mean by "they" to refer to the Independent organization?

A. I referred to Mr. Thompson, I wrote him a letter and asked him.

Q. He was acting for the Independent?

A. At that time he was; yes, sir.

Q. And when you say you got nowhere, they refused to comply with your request, is that it?

A. That is correct.

[fol. 990] Q. Mr. Wallace, did you or anyone connected with the company management, so far as you know, have anything to do with the organization and maintenance of the Independent Union?

A. To the best of my knowledge, no.

Q. Did you or anyone on behalf of the management, so far as you know, have anything to do with the organization and maintenance of that Independent Union?

A. No, sir.

Q. Did you or anyone connected with the company or anyone for or on behalf of the company have anything to do with the preparation and publication of newspaper articles by Mr. Thompson?

A. No, sir.

Q. Did Mr. Thompson in any way represent your company in connection with the labor trouble at Richwood?

A. No, sir.

Q. Has he ever represented the company or acted as agent for the company in any capacity?

A. To the best of my knowledge, no.

Mr. Ritchie: I think that is all.

Trial Examiner Spencer: Mr. Wallace, according to your understanding of the meaning of the term "closed shop" and "union shop", do you consider that you now have a closed shop or a union shop contract with the Independent?

The Witness: I do not so consider it.

[fol. 991] Mr. Clubb: What is that?

The Witness: I do not consider it so.

Trial Examiner Spencer: Well, I don't believe I understand just what you mean.

The Witness: I do not believe that we have a closed shop.

Trial Examiner Spencer: You understand it as a union shop clause?

The Witness: I understand that we have now a union shop with the right to hire and fire, whereas a closed shop is a different animal.

. . . . . .

[fol. 992] Q. And during that time just what instructions did you give Mr. Davis?

A. I told Mr. Davis we might just as well be accustomed to the fact that we were going to have a union shop and there was no reason to argue against it, that I did not think I would want to operate under a closed shop, which I understood to mean as Mr. Spencer has brought out here.

Q. Well, what else did you do in the six hours?

A. Well, Art and I have been friends for some 25 years [fol. 993] and there is a lot to talk about, you know.

Q. I understand that you were talking about this union organization for six hours, is that correct?

A. Off and on, yes; off and on.

Q. Well, was this position that you have expressed your position before you expressed it with him?

A. No, I had formed no position before I discussed it with him.

Q. Then it was a question of him telling you what was going on; is that correct?

A. That is correct.

Q. And then you came to that conclusion?

A. That is right.

Q. And that was your position throughout?

A. That is right. The only thing I ever asked for and the only thing that I ever wanted was a Labor Board election and you can find that throughout the entire correspondence.

Q. Was it your understanding at the time this contract was entered into that all the employees, if they asked for membership in the union, would be given that permission?

A. Frankly, sir, I never thought of it, it never occurred to me. I certainly did not expect them to refuse 42 people.

Q. Well, did you expect them to refuse anybody

A. No, I did not. I thought once the election was held and the union certified to, that our troubles were over, and [fols. 994-1001] it never entered my mind.

* * * * * * * * *

[fol. 1002] Redirect examination.

[fol. 1003] By Mr. Chubb:

Q. Mr. Wallace, I think you have already stated that, or give testimony that The Wallace Corporation is owned by your family, by yourself. Now, let me ask you about the Cherry River Boom & Lumber Company. Does anybody connected with that company have any interest in your company, directly or indirectly?

A. No, sir.

Q. Does anybody connected with your company, so far as you know, have any connection with the Cherry River Boom and Lumber Company?

A. No, sir.

Q. Or any interest in it?

A. No, sir.

Q. Do you have any connection with the Woodyard Publications or any interest in it?

A. No, sir, I have not. That is the one that owns the Nicholas Republican.

Q. So I understand.

A. No.

Mr. Chubb: I think Mr. Ritchie covered your connection with Mr. Thompson. I think that is all.

The Witness: I might add, Mr. Spencer, in connection with that, that when the Cherry River Paper Company pulled out of Richwood and established their plant at Plymouth, my supply of ready paper was gone. That, coupled [fol. 1004] with the fact of the logs, was one of the reasons why I was looking for another place to go.

Mr. Chubb: By the way, did you know the Cherry River Boom & Lumber Company was on strike at the time of this conversation, this remark that you made that you could not get logs?

A. Yes, they were on strike.

Q. They were on strike?

A. Yes.

Q. When did this other development, the paper company moving out, when was that?

A. I think in the early spring of this year finally and completely.

Q. You use paper board in connection with your paper dishes?

A. That is right.

Mr. Chubb: That is all.

Trial Examiner Spencer: Mr. Ritchie.

Recross examination.

By Mr. Ritchie:

Q. When you stated that Mr. Thompson had refused to publish this telegram to which you made reference, you meant by that that he just failed to publish it?

A. He just did not.

Q. You had no information as to why?

A. There was no refusal.

Q. You have no information as to why he did not?

[fols. 1005-1007] A. No, sir, I have not. I requested him to.

Mr. Chubb: You had asked him to give it equal publicity as the other?

The Witness: That is correct.

By Mr. Ritchie:

Q. And at the time that you sent that telegram, did you have any intention of it being used for the purpose of influencing the election at the plant?

A. No, sir.

Q. Did you or anyone connected with the company or anyone on behalf of your company, so far as you know, do or say anything that was intended to influence the election at the plant?

A. No, sir.

[fol. 1008] A. F. Davis was recalled as a witness by and on behalf of the Respondent, The Wallace Corporation, and having been previously duly sworn, testified further as follows:

The Witness: There has been no change of status in the position of Lundy Groves.

Trial Examiner Spencer: Now, when work was resumed after the strike, did Lundy Groves have the same job that he did before the strike?

The Witness: Exactly; still has.

Trial Examiner Spencer: Now, has he received any promotions or wage increases other than the general wage increases that have been testified to by Mr. Christmas?

The Witness: Not other than the general increases; no sir.

Trial Examiner Spencer: Does the same apply to Ansel Smith?

The Witness: The same applies to Ansel Smith.

Trial Examiner Spencer: Does the same apply to Carm Reese?

The Witness: There has been a change in the status as [fols. 1009-1013] to Carm Reese.

Trial Examiner Spencer: Will you let us have that, briefly?

The Witness: Due to a former experience of Carm Reese in the filing room and due to a laying off of a man in the filing room at the time that the 40 people were laid off, it was necessary for us to have an experienced man in the filing room, therefore we searched our plant to find somebody that had that experience and we placed Carm Reese in there. It did give him a slight increase in pay over his former job as oiler, because of that job, because it did not give him any higher increase in pay than he had been paid on that job.

Trial Examiner Spencer: That occurred on or about the time of the layoff?

The Witness: That occurred after, either on March 18th or a day or so afterwards.

Trial Examiner Spencer: Well, that covers the information that I was seeking. Do you have any questions, Mr. Ritchie?

Cross-examination.

By Mr. Ritchie:

Q. Did you have anyone other than Carm Reese available.

A. We did not.

[fol. 1014] WILLIAM T. CHRISTMAS a witness previously called by and on behalf of the Respondent, The Wallace Corporation, being previously duly sworn, was recalled and further testified as follows:

Direct-examination:

Mr. Chubb: Now, if you do not mind my leading him, Mr. Shroyer.

Mr. Shroyer: That is all right.

By Mr. Chubb:

Q. I believe your testimony was that in your wage level between the time of the strike and the present was 15 per cent, representing an increase, is that correct?

[fol. 1015-1018] A. My statement was that the average hourly wage at the present time is 15 per cent higher than it was at the time the strike started.

Q. Now, you also testified, I think, that the increase to which you referred included increases which were instituted by the wage and hour regulations affecting the wood industry; is that right?

A. Yes, that is right.

Q. Now, have you ever figured out what part of the average increase, in average hourly wages at the plant, is due to the wage and hour regulations alone, or the changes necessitated by the wage and hour regulations alone?

A. Yes, I have figured it. I do not have the figures with me. The increase from 30 cents to 35 cents as required in the minimums affected only a small part of our plant, it was largely girls in the clothes pin department and the total amount of that increase was a very small part of this 15 per cent average hourly increase because, as I believe I said this morning, in the paper dish department we already had a 40-cent minimum under the wage-hour, so of course that was not increased any.

. . . . . .

[fol. 1019] MOTION TO DISMISS

Mr. Chubb: If the Examiner please, I would like at this point to renew my motion to dismiss on all the evidence. I take it it is unnecessary to argue the motion at this time.

Mr. Ritchie: Counsel for the Respondent Thompson and the Intervener join in the motion.

Trial Examiner Spencer: Do you want to make a separate motion as to the Respondent Thompson?

Mr. Ritchie: Yes.

Trial Examiner Spencer: Very well.

Mr. Ritchie: Counsel for the Respondent Thompson desires to move separately to dismiss the complaint in so far as it relates to Thompson, on the ground that there is absolutely no evidence to support the charges alleged against him.

Trial Examiner Spencer: I will reserve my ruling on the two motions just made, gentlemen, just made by Mr. Chubb and Mr. Ritchie. Are there other motions at this time?

. . . . . .

[fols. 1020-1025] MOTION TO STRIKE

Mr. Chubb: May I now renew my motion to strike all of the testimony adduced on behalf of the Board at this point for the same reasons and on the same grounds as mentioned at the end of their case.

Trial Examiner Spencer: I will reserve ruling on that.

[fol. 1026] RESPONDENT WALLACE CORPORATION'S EXHIBIT 6

(Western Union Telegram)

1HN GX 111 2 Extra NT

Charleston WV1R Dec. 30.

Charles Davis

General manager the Wallace Corporation Richwood WV1R.

In the interests of national unity, for the sake of harmony and to prevent the possibility of blood-shed, if and when you attempt to open your plant, I have influenced your workers to make you a further compromise proposition, which is as follows Local Union 129, UCWOC, will agree, with the approval of the National Relations Labor Board, to enter into a consent election, with you and your Company Union, on the condition that when we prove a majority and become the exclusive bargaining agency for all your employees, that as a condition of employment all eligible employees must become members of Local Union 129, UCWOC. Wire answer.

George J. Titler, Field Representative UCWOC

825AM DEC 31ST.

[fol. 1027] RESPONDENT WALLACE CORPORATION'S EXHIBIT 7

Day Letter Paid

St. Louis Jan. 25th, 1942.

B. E. Thompson
c/o Nicholas Republican
Richwood, West Va.

Regret that some impressions seem to have been formed by my telegram answering your inquiry concerning our

sources of logs and production. It was not my intention that telegram should in any way affect the outcome of or influence the voters in the election next Friday. We have always insisted that all employees be given equal opportunity to express themselves on questions presented by the Labor Board free from threats or coercion of any kind. We trust you agree and will give this message publicity.

The Wallace Corporation, M. B. Wallace, Jr.

Philip G. Phillips
National Labor Relations Board
Federal Building
Cincinnati, Ohio.

Following sent to B. E. Thompson quote—(Repeat message above and same signature.)

The Wallace Corporation, M. B. Wallace Jr.

The Wallace Corporation
2000 South Hanley Road
Maplewood P. O.
Hi 2280

[fol. 1028] RESPONDENT WALLACE CORPORATION'S EXHIBIT 8

Woodyard Publications
Spencer, West Virginia
Publishers

B. E. Thompson
Richwood, West Virginia
Editor-Manager

The Nicholas Republican
Established 1903
Richwood, West Virginia

February 28, 1942.

Mr. Wm. T. Christmas,
The Wallace Corporation,
Maplewood Post Office,
St. Louis, Mo.

DEAR MR. CHRISTMAS:

With reference to the "Closed Shop" clause in the contract recently presented to your Mr. Davis here, we have again consulted our attorney, Mr. Charles Ritchie, of Ritchie, Hill and Thomas at Charleston.

Although Mr. Davis, in our opinion, seems rather unyielding in his opposition to the idea, it is the unreserved opinion of both Mr. Ritchie and ourselves that the "Closed Shop" offers the only protection included in the Wagner Act that would be favorable to the interests of all concerned.

Therefore, we have tagged it as one of the "Musts" in our contract, and no counter bargaining propositions which may exclude it will be agreed to by us.

Please recall that we were recently certified by the labor board as the official bargaining agency for the employees of your plant here. This certification was obtained after an extremely hard fought and hazardous campaign by a majority of only fifteen votes.

Since then our members have reported that several new employees who were and still are favorable to the interests [fol. 1029] of our opponents have been given jobs and are now working in your plant. If other similar minded employees are given jobs in your plant, it won't be long until our majority of fifteen will be either jeopordized or overcome.

The Wagner Act, as we understand it, provides that at any time the majority of any group may so elect they may legally switch their affiliations from one labor organization to another. Therefore, if you continue to hire new employees who are favorable to the interests of our opponents, they will be in the majority before long and affiliation with our opponents would probably be their next step.

The only protection from this evil that is available to us is a Closed Shop, which, according to the Research Institute Analysis, provides: "The only time that an employer may lawfully discharge an employee for not joining a union, or for joining the 'wrong' union, is when he has a closed shop contract with a bona fide union representing a majority of his employees. If that contract requires all the employees covered by it to join the contracting union and remain in good standing in order to obtain and retain their jobs, the employer may discharge any employee who refuses to do that."

The "Closed Shop" will, therefore, give us some control in preventing the hiring of additional employees who are unfavorable to our interests and who would further jeopordize our majority. It would also provide us with a legal means of disposing of any present employees, includ-

ing Harvey Dodrill whom our members have declared by unanamous ballot that they will not work with, whose presence in the plant is unfavorable to our interests because those who are so unfavorable will not be permitted to become members of our organization and without such membership they would not be permitted to work in the plant under a closed shop contract which we respectfully insist that we MUST have.

[fol. 1030] It is hoped, however, that from the emphasis that we place on this MUST you will not become convinces that our intentions are to become radically unreasonable and try to dictate to Mr. Davis and you how to operate your plant.

We hope that you will trust us sufficiently to believe that we have no intention of becoming unreasonable nor to at any time become unmaindful of the respect that you are entitled to.

Our desires are to cooperate and to invariably recognize the interests that are yours and extend the respect that is due you. We must insist, however, upon a closed shop and we would genuinely appreciate it if until it can be effected you will avoid taking on any additional employees whose sympathies are favorable to the interests of our opponents.

Respectfully yours, B. E. Thompson, Business Agent, RC&DWU.

Copies to Mr. A. F. Davis, Mr. Charles Ritchie.

[fol. 1031] RESPONDENT WALLACE CORPORATION'S EXHIBIT 9

March 20, 1942

Mr. B. E. Thompson, Business Agent
Richwood Clothespin and Dish Workers Union
Richwood, West Virginia

DEAR MR. THOMPSON:

In confirmation of my telephone conversation with you of yesterday, I feel very concerned over the report we had from Mr. A. F. Davis, Manager of our Richwood factory, to the effect that between thirty and forty of our regular

employees were prevented from working yesterday due to their not having membership in your Union.

Mr. Phillip Phillips of the Cincinnati office of the N. L. R. B. telephoned our Attorney, Mr. Walston R. Chubb, saying that he had been advised a large number of our people had been unable to go to work yesterday and as we understand it Mr. Phillips felt that perhaps some injustice had been done. Mr. Chubb tells us that Mr. Phillips may call a conference in Cincinnati at some early date to which he expects to invite members of your organization to determine what the situation is.

It is true that we do not know how many of those who are now layed off actually have tried to join your organization or have refrained from joining of their own choice. However, if there are any of our employes who desire to become members of your Union and return to their jobs, I want to again appear to your members to reconsider any previous decisions and wherever possible, make arrangements to let such people come back to work.

As you know, after an election conducted by the Labor Board, your Union was certified to us by the Board as representing a majority of our employees. We then pro- [fol. 1032] ceeded to negotiate a contract with your organization, and it is the intention of this Company to live up to the provisions of that contract to the best of its ability. When our Mr. Christmas talked to you on March 9th, you will recall that he appealed to you to see that the closed shop clause, which your Union insisted be included in the working agreement, should not be used in any way to unfairly prevent any person from working who wanted to work. We realize, of course, that the contract does not give the Company the right to tell the Union who to admit as members, and for that reason Mr. Christmas' talk with you and mine over the telephone could only be directed to the sense of fairness which we believe exists in the minds of your members.

Entirely aside from the fact that having to lay off this large number of experienced people will badly cripple our production which is urgently needed, we feel that it is indeed a sad situation where, account of some individual differences of opinion, people who have perhaps been friends and neighbors for many years cannot work to-

gether. I will appreciate your advising me what can be done.

Yours very truly, The Wallace Corporation, Mahlon B. Wallace, Jr. President.

MBW:HL.

[fol. 1033] RESPONDENT WALLACE CORPORATION'S EXHIBIT 11

GENTLEMEN:

As you know charges were filed against this Company with the National Labor Relations Board claiming that the Company or some of its representatives have intimidated or coerced some of its employees in their union activities.

The purpose of this letter is to advise you that you are not to in any way try to intimidate or coerce any of our employees with regard to organizing or joining a union of any sort. This is an entirely voluntary matter on their part over which we have no jurisdiction, and we ask that you observe this faithfully since the Company does not want to in any way lay itself open to a charge of a violation of any Federal laws.

Yours very truly,

Notice Attached to Letter

Employees may join any labor union of their own choosing. They may refrain from joining any labor union. The Company takes no position in the matter one way or the other. Each employee must decide for himself. Whether you belong to a labor union or do not belong, you will be accorded the same treatment as any other employee. This is the law of the land and the policy of the Company.

[fol. 1034] RESPONDENT WALLACE CORPORATION'S EXHIBIT 12

Notice to Employees

The following provisions are made in Section (c) of Article I in a working contract between the Wallace Corporation and the Richwood Clothespin and Dish Workers Union which became effective on the date of March 7, 1942.

"The Company Agrees That All of Its Employees, Other Than Office Personnel, Superintendents, Managers, Fore-

men, Watchmen and Any Others Assigned to Supervisory Duties, Shall Be Members of the Union in Good Standing. With Respect to Present Employees of the Company Not Now Members of the Union and Likewise With Respect to Any Person Hereafter Hired by the Company, Other Than Those Above Expressly Excepted, All Such Persons Shall Become Members of the Union Within 10 Days From the Date of This Agreement, as to Present Employees, or Within 10 Days From the Date of Employment With Respect to Future Employees, and the Company, Upon Request of a Duly Authorized Officer of the Union, Designated for the Purpose, Shall Require Identification of Any Employee as a Member of the Union and Proof of Good Standing."

All employees are hereby notified to govern themselves accordingly.

——, Zola Smith, Secretary, Richwood Clothespin and Dish Workers Union.

[fol. 1035] RESPONDENT WALLACE CORPORATION'S EXHIBIT 14

(National Labor Relations Board Seal)

National Labor Relations Board
Ninth Region

U. S. Post Office and Courthouse
Cincinnati, Ohio

November 3, 1941.

The Wallace Corporation,
Richwood, West Virginia.

Re: Case No. IX-R-658

GENTLEMEN:

A petition pursuant to Section 9 (c) of the National Labor Relations Act has been filed with this office by the Richwood Clothespin & Dish Workers Union, requesting certification of representative for collective bargaining among all your employees except those who have supervisory or managerial powers and office employees, paid upon a salary basis.

We would appreciate learning your attitude in the matter.

Very truly yours, Philip G. Phillips, Regional Director.

PGP ad.

[fol. 1036] RESPONDENT WALLACE CORPORATION'S EXHIBIT 16

(Western Union Telegram)

Wausau Wisc 1/27/42

A F Davis
Wallace Corp Richwood WVIR

Sending following message to Phillips Quote at your request we are posting copy our second telegram to Thompson on factory bulletin board. Since Thompson is business agent for Richwood Union we feel controversy should properly be between your office and Thompson Will be Blackstone Hotel Chicago Wednesday morning if you have any further suggestions end quote Get copy our second message to Thompson and post on board.

M B Wallace Jr

[fol. 1037] RESPONDENT WALLACE CORPORATION'S EXHIBIT 17

November 5, 1941.

Mr. Phillip G. Phillips
Regional Director
N. L. R. B.
U. S. Post Office and Courthouse
Cincinnati, Ohio

DEAR MR. PHILLIPS:

Following a telephone conversation with you last week, the undersigned, Mahlon B. Wallace, Jr., President of the Wallace Corporation, with Mr. Wm. T. Christmas, Vice-President, proceeded from St. Louis to Richwood, W. Va., for a conference with Mr. Russell R. Miller, representing your office. We understood that Mr. Miller was to make an investigation of the situation, not limiting the scope of his investigation to the charges of violation of Section 8 (1) and 8 (3) of the Act, but also to investigate charges

of a company dominated union at our plant in Richwood. We have received no official notice of the latter charges except by your verbal statement.

Our Mr. Christmas contacted Mr. Miller by telephone at Charleston on October 30th and was likewise led to believe that Mr. Miller intended to go into the entire strike question and try to get the people back to work, which, of course, has been our primary objective. We left here last Sunday and arrived in Richwood in time for a conference on Monday, November 3rd, at 2:00 P. M.

We produced at the conference, although not specifically requested to do so, all of our foremen, except one man who was attending a funeral in Ohio.

After introductions, Mr. Miller made a statement to the effect that he had come to investigate the charge that the company had formed and dominated an independent union; [fol. 1038] that his purpose in coming to Richwood was to determine whether the charge was true and that he had already decided it was true. This statement was made within five minutes of the opening of the meeting and this was before talking either to us or to our foremen.

We expressed surprise that Mr. Miller should have reached any such conclusion before hearing our side of the story. He admitted on questioning that all his information had come from representatives of the CIO, although he later said that he had talked to some of our employees at Charleston whose union connections were unknown to him.

Both the undersigned and other representatives of the company were careful to preserve a fair and courteous attitude and several times requested Mr. Miller to make further investigation and reconvene the meeting the next day. The only thing Mr. Miller would do was to take the names of the foremen present but he did not question them about the subject of his investigation. Mr. Miller refused to reconvene the meeting. He further told us: "I do not want to put all my cards on the table", whatever that may have meant. The representatives of the company almost pleaded with him to make a full investigation and he then named one Carnes Reese and Lundy Groves as instrumental in forming the so-called company union, and inquired as to whether or not they were foremen. He was fully informed that these men were not authorized to hire and fire, nor did they have any authority from the com-

pany that would make them supervisory employees in any way. It was suggested that he talk to them and he declined to do so.

The only suggestion that Mr. Miller had to make in regard to settling the matter was that we consent to a "Yes or No" election on CIO representation, a proposal that had been made many days ago by the CIO themselves.

[fol. 1039] We are aware that the situation at Richwood is a difficult one, complicated by a simultaneous strike at another plant, the Cherry River Boom and Lumber Company. In view of this situation we are of the opinion that Mr. Miller failed to make a reasonable effort to find out what our people had to say about the charges. He appeared to us to have prejudged the entire question.

It is, perhaps, only incidental that the writer and his Vice-President traveled some nine hundred miles to attend this conference in an effort to make some progress, as that is merely an matter of inconvenience. We do believe, however, it is a matter of grave consequence, after going to this trouble, to be met with such an unfair attitude on the part of the representative of the N. L. R. B.

Mr. Miller advised us that the next step in the procedure is a hearing before the Board which will involve great delay. Notwithstanding this preliminary experience, we are of course, prepared to follow this procedure. It does seem to us, however, that the influence of the National Labor Relations Board should be directed toward getting these people back to work while the representation question is being settled in an orderly manner. If there is any suggestion that you have to make to that end, we should be glad to have it.

Very sincerely yours, The Wallace Corporation Mahlon B. Wallace, Jr. President.

MBW/j.

[fol. 1040] RESPONDENT WALLACE CORPORATION'S EXHIBIT 18

(National Labor Relations Board Seal)

National Labor Relations Board

Ninth Region

U. S. Post Office and Courthouse

Cincinnati, Ohio

November 6, 1941.

Mr. Mahlon B. Wallace, Jr.,
President,
The Wallace Corporation,
St. Louis, Missouri.

DEAR MR. WALLACE:

Re: The Wallace Corporation
Cases Nos. IX-C-1478, IX-R-658

This will acknowledge your letter of November 5, 1941. Before answering in detail, I would like to hear Mr. Miller's version of the story. Our field examiners, of course, are instructed to get all sides of the story. I know Mr. Miller from past experience has received many letters of praise from employers because of what they considered his fair minded attitude and I am at a loss to understand how he could have conducted himself as you allege, if he did. As soon as I receive a report from him, you will hear from me.

Meanwhile, if you feel it would be wise, as soon as I receive Mr. Miller's report of the evidence he has obtained, I will be only too happy to see you at my office in Cincinnati. I assure you my only desire is to learn the facts and to take what steps are warranted after I hear all sides of the question with an open mind.

Very truly yours, Philip G. Phillips, Regional Director.

PGP:GF.

[fol. 1041] RESPONDENT WALLACE CORPORATION'S EXHIBIT 19

(Western Union Telegram)

Wausau Wise 1/27/42

Philip G Phillips Director
Natl Labor Board U S PO Bldg Cincinnati Ohio

At your request we are posting copy of our second telegram to Thompson on factory bulletin board. Since Thompson is business agent for Richwood Union we feel controversy should properly be between your office and Thompson will be Blackstone Hotel Chicago Wednesday morning if you have any further suggestions

M B Wallace Jr

RESPONDENT WALLACE CORPORATION'S EXHIBIT 20

(National Labor Relations Board Seal)

National Labor Relations Board
Ninth Region
U. S. Post Office and Courthouse
Cincinnati, Ohio

January 28, 1942.

M. M. B. Wallace, Jr.,
The Wallace Corp.,
St. Louis, Missouri.

Dear Mr. Wallace:

Thank you very much for your telegram of January 27.

Yours very truly, Philip G. Phillips, Regional Director.

PGP:GF.

[fol. 1042] RESPONDENT WALLACE CORPORATION'S EXHIBIT 21

(National Labor Relations Board Seal)

National Labor Relations Board

Ninth Region

U. S. Post Office and Courthouse

Cincinnati, Ohio

March 20, 1942

The Wallace Corporation
Richwood, West Virginia

Re: Case No. IX-C-1601

Gentlemen:

A charge has been filed with this office by Local Union 129, United Construction Workers Organizing Committee, alleging that you have violated Section 8 (3) of the National Labor Relations Act in that on or about March 18, 1942 you discriminately discharged approximately 39 of your employees because of their activities in behalf of the said union, stating that the "Richwood Clothespin & Dish Workers Union" refused them membership.

This case has been assigned to Mr. George McKay, who will doubtless contact you shortly. Meanwhile, we would appreciate hearing from you your version of the facts in the case.

Very truly yours, Philip G. Phillips, Regional Director.

PGP:LR.

[fol. 1043] RESPONDENT WALLACE CORPORATION'S EXHIBIT 22

Lewis, Rice, Tucker, Allen & Chubb
208 North Broadway
St. Louis, Mo.

April 13, 1942

Mr. Phillip G. Phillips,
Regional Director,
National Labor Relations Board
U. S. Post Office & Courthouse,
Cincinnati, Ohio

Re: The Wallace Corporation
Case #X-C-1601

DEAR MR. PHILLIPS:

Please pardon my delay in answering your letter of April 8th on the above matter. I also have a personal note of the same date about the closed shop provision of the Wagner Act.

I have received the letter which you also received in which the Richwood Clothespin and Dish Workers Union indicate that they do not care to interview or otherwise reopen the question of admittance of the non-member employees. I also have received another letter from Mr. Ritchie indicating that he is renewing his efforts to have something done to comply with my suggestion. I have not heard anything further from him.

I expect that you fully grant to both me and my client the intention and good faith to attempt to use what influence we have to reinstate the old employees. That was the primary purpose of my trip to Cincinnati and also of my correspondence since that time with Mr. Ritchie. I mention this because in your letter of the 8th you indicate [fol. 1044] that you regard the act of The Wallace Corporation as a "voluntary" act. Please retrace if you will, the history of the present situation. You will recollect that in settlement of the strike we made an agreement in which we stated that we would enter into a closed shop or union shop contract with whichever of the unions that should be selected as the bargaining agent. I was extremely sorry

to see this provision in the settlement contract and as I had previously said to you, I do not approve of the closed shop provision. Following the election, which was apparently without objection or exception on the part of anyone, the company thereupon entered a working contract with the Richwood Clothespin and Dish Workers Union and found it necessary, even against my advice to insert the closed shop agreement. The agreement gave some time for old employees to join the union but they were not apparently acceptable in all cases to the Richwood Clothespin and Dish Workers Union and therefore we felt that under our contract we were required to lay them off, which was done. I suppose that in some sense this could be called a voluntary act, but certainly it was not done by choice of the company and it was unquestionably against my advice that they got into the situation necessitating that they have a closed shop situation.

I appreciate your desire to see these people returned to work and entirely concur with you in that attitude. You must not feel, however, that your request is being denied by any action or intention on our part. If I am in error in believing that it would be a violation of our contract with the union to return these people to work, even though they are not members, I wish you would let me have your views. The observation of contracts, is after all a rather important item even where, as in this case, it results in considerable hardship.

I have read the Vacuum Electric case rather carefully since hearing from you but do not feel that it particularly illuminates the present problem. You will observe that [fol. 1045] the court found in that case that there was an oral contract or an oral provision agreed to in connection with the original contract in 1935 or 1936 which required new employees to become members of the A. F. L. group. There is no suggestion anywhere in the case that this provision was invalid. In fact, as I read the opinion, the court sustained the provision and did not order reinstatement of new employees who were laid off for failure to join the union.

It is, of course, true that if it is found that an employer fosters or encourages a union, it can not thereafter rely upon a closed shop clause. We have an extremely unusual situation in our case because the closed shop clause

which we negotiated with the Richwood Clothespin and Dish Workers Union really originated out of a strike settlement which provided in advance for a closed shop or union shop agreement, regardless of which union was successful in establishing itself as the bargaining agent. It seems to me that so long as there was no vice in the election itself, that we could hardly be accused of favoring one union over another when we were bound to make a closed shop contract with whichever one prevailed. We certainly took back to work at the time that the settlement was made all the men that we could, and showed no discrimination at that time. You will remember that when I expressed considerable concern about the closed shop clause required by the union in their working contract, you made the remark over the telephone that probably I would have to agree to it as the C. I. O. certainly would have insisted upon it if they had prevailed in the election.

Referring to your personal comment about the Wagner Act, I was much interested in knowing that you had done some work for Senator Wagner in preparation of the Act itself. You are quite mistaken in thinking that I was sarcastic in suggesting that the closed shop clause was really a boomerang in this particular instance against the [fol. 1046] C. I. O. It was my impression, and I may be mistaken in this, that one of the principal bones of controversy in the steel industry and others was over the closed shop clause and that the C. I. O. Union had insisted strenuously upon it. It was that I had in mind when I suggested that in this case it was a boomerang against them. Be that as it may, I take no pleasure in it whatsoever and did not intend in any way to be sarcastic nor to reflect upon Senator Wagner nor the originators of the act. I have always had a high admiration for Senator Wagner and realize that the closed shop problem has been a difficult one to meet in this legislation. That attitude, however, does not mean that I approve of the closed shop provision of the Act nor does it mean that I can accept all of the provisions of the act as final perfection.

I need hardly say that I greatly appreciate your reasonable attitude about this entire situation. The case is one which would probably be very interesting if presented and I will give you full credit for doing everything you can to see the difficulties ironed out rather than to get

into further litigation. I hope you will grant me similar good faith in my efforts.

Just as soon as I hear anything further from Mr. Ritchie or the Richwood people I will let you hear from me.

Very truly yours,

RWC:O.

[fol. 1047] RESPONDENT WALLACE CORPORATION'S EXHIBIT 23

(National Labor Relations Board Seal)

National Labor Relations Board

Ninth Region

U. S. Post Office and Courthouse

Cincinnati, Ohio

April 8, 1942.

R. W. Chubb, Esq.,
208 North Broadway,
St. Louis, Mo.

DEAR MR. CHUBB:

Re: The Wallace Corporation
Case No. IX-C-1601

This will acknowledge your letter of April 6. I enclose herewith copy of letter which I have this day written to Mr. Ritchie.

I assure you that we will fully investigate this case before any definite action is taken. We will do it as speedily and promptly as possible. I do not feel, however, if there is any burden being cast upon your client, that it is the fault of the Board. After all, if it chose voluntarily to dispense with the services of some 40-odd individuals, and if this be a violation of the law, it has itself and only itself to blame. I cannot see why the needless risk of liability when the question could have been determined fully and completely without discharging these individuals with the concomitant hardship and a loss of earnings to them. I again beseech

you to return them to work pending a decision by the National Labor Relations Board on the question.

[fol. 1048] If the Board should dismiss such charges as are now pending, you could then discharge the persons forthwith if that was your desire. On the other hand, if the Board sustains the complaint, the persons would have retained their positions and your client would have no further liability because of their wrongful discharge. I feel that the Supreme Court's decision clearly indicates the trend of the law and the obvious violation upon the part of your client.

Yours very truly, Philip G. Phillips, Regional Director.

PGP GF.

[fol. 1049] Respondent Wallace Corporation's Exhibit 24

Woodyard Publications
Spencer, West Virginia
Publishers

B. E. Thompson
Richwood, West Virginia
Editor-Manager

The Nicholas Republican

Established 1903

Richwood, West Virginia

April 6, 1942

Mr. R. Walston Chubb,
208 Broadway,
St. Louis, Missouri

Dear Mr. Chubb:

It has been decided by unanimous vote of all members present at the last regular meeting held by the Richwood Clothespin and Dish Workers Union to forego the proposition of interviewing rejected applicants for membership as suggested by you in Cincinnati.

Therefore, no effort will be made to arrange for these interviews.

Copies of this letter are being dispatched to Mr. Phillips at Cincinnati and to Mr. Ritchie at Charleston for their information and files.

Very truly yours, B. E. Thompson, Business Agent, Richwood Clothespin and Dish Workers Union.

cc: Mr. Phillips,
Cincinnati, Ohio
Mr. Ritchie
Charleston, W. Va.

[fol. 1050] NOTE

A copy of the most recent "Yellow Sheet" is enclosed. It was distributed here on Saturday afternoon, April 4. It is interesting to note that they got it out while the interviews proposed by you were under consideration and before they were advised of our reaction to the idea. Therefore, it seems obvious that they had no intentions of showing square, even if we had decided to have the interviews. It is also interesting to note that they almost admit that they know what the official of Unemployment Compensation will do even before that official has expressed himself on the matter.

[fol. 1051] RESPONDENT WALLACE CORPORATION'S EXHIBIT 25

Lewis, Rice, Tucker, Allen & Chubb
208 North Broadway
St. Louis, Mo.

April 6, 1942.

Mr. Philip G. Phillips,
Regional Director,
National Labor Relations Board,
Cincinnati, Ohio

Re: The Wallace Corporation
Case IX-C-1601

April 6, 1942.

DEAR SIR:

Upon my return to St. Louis I find yours of March 30th, also letter from Mr. Ritchie stating that he understood

Mr. Thompson was going to give him a report on steps taken to comply with the suggestion which I made in Cincinnati. I am writing to Mr. Ritchie today and trying to impress upon him the urgency of the situation and asking for a report as soon as possible.

I also have received your letter of April 4th calling my attention to the Supreme Court decision in the Electric Vacuum case. I think it was Mr. Ritchie who cited this case to you as I was not familiar with it.

I do not know whether the holding of the consent election technically precludes reopening the entire question of company domination of the Richwood Clothes Pin and Dish Workers Union. I can only say to you again what I have said before, that as far as I am advised or familiar with the attitude of the local officials, there has been no indication of domination. From the standpoint of the complaining union, however, I can hardly justify a com-[fol. 1952] plaint at this time which would nullify the election which was held under Labor Board auspices and reverse the position which they took when they consented to that election. If such an election is to be given no effect whatever because of a later assertion of company domination of one of the unions, it would put the complaining union in the position of binding themselves to such an election only if it was favorable in its result.

I am sorry that you indicated in your letter of the 30th that you felt a violation of the Act was clearly indicated, because if you are correct it leaves hanging over our heads possible liability for back pay and would indicate, just as a matter of prudence, the desirability of an immediate hearing and conclusive determination of the question.

While I have no reason to fear the outcome of a hearing and complete airing of the matter, it does look to me like a good deal of lost motion and unnecessary expense in this matter.

I will let you hear from me promptly just as soon as I hear from the representatives of the Richwood Clothes Pin and Dish Workers Union.

Very truly yours, ——.

RWC:O.

[fol. 1053] RESPONDENT WALLACE CORPORATION'S EXHIBIT 26

(National Labor Relations Board Seal)

National Labor Relations Board
Ninth Region
U. S. Post Office and Courthouse
Cincinnati, Ohio

March 30, 1942.

R. Walston Chubb, Esq.,
Lewis, Rice, Tucker, Allen and Chubb,
208 North Broadway,
St. Louis, Missouri.

DEAR MR. CHUBB:

Re The Wallace Corporation
Case No. IX-C-1601

This will acknowledge your letter of March 27, 1942.

The letter which was written about Mr. McKay was sent to the company long before our conference in Cincinnati and for that purpose may be disregarded.

I will expect to hear from you in the middle of the week concerning the plan which you and Mr. Ritchie discussed while here.

I do not think that the only theory upon which I predicated a possible violation of the Act was the one discussed in your letter. Even if my theory of the law is unsound, I still feel there are other theories upon which a violation clearly is indicated.

Yours very truly, Philip G. Phillips, Regional Director.

PGP:GE.

[fol. 1054] RESPONDENT WALLACE CORPORATION'S EXHIBIT 27

Lewis, Rice, Tucker, Allen & Chubb
208 North Broadway
St. Louis, Mo.

March 27, 1942.

Mr. Philip G. Phillips,
Regional Director,
National Labor Relations Board,
Cincinnati, Ohio.

Re: The Wallace Corporation
Case IX-C-1601

DEAR MR. PHILLIPS:

Your letter of March 20th addressed to The Wallace Corporation has been referred to me. I note the case has been assigned to Mr. George McKay. I assume that you will advise Mr. McKay of our conference yesterday and of proposals which were discussed to alleviate the hardship occasioned by the closed shop clause in our contract dated March 7th with the Richwood Clothes Pin and Dish Workers Union. As I informed you even before you telephoned me about this, Mr. Wallace had made efforts to get the Union to take most of these people back because he needed them in the work.

While I was quite willing to cooperate in the interests of harmony, we suggest that the present complaint should be dismissed. We have had a three months strike accompanied by violence and great loss to us; we have had a consent election to which no exceptions were filed; the closed shop clause in the subsequent contract was none of our choosing. We don't like it any more than we liked the strike or the present lay-off of employees.

[fol. 1055] There should be an end to litigation and complaints. We think it is time now for you to let all parties know that you can not retain jurisdiction indefinitely.

Answering your request for our version of the facts, it is needless to say that these employees were laid off upon notice by the Richwood Clothes Pin and Dish Workers Union under the contract that they had not been accepted as union members. It is my understanding that some of the 39 to whom you referred let us say 10 of them have made no application to join the Union, but that the bal-

lance, let us say 30, had indicated their willingness to join the Richwood Union. Membership in the union is beyond the Company's control.

I think it is quite unnecessary for me to say to both you and Mr. McKay that the company has reluctantly complied with the Union demands in this matter. We consider that the employees in question are laid off and not permanently discharged and, as stated to you yesterday, we have suggested that the Union reinvestigate the situation and see whether some of these people can not be admitted to membership.

In conference yesterday you raised a legal theory which I had not previously considered, that the proviso of Section 8 (3) does not legalize lay-off of employees for non-membership in the Union, pursuant to a closed shop contract. In disagreeing with you I do not intend to defend closed shop contracts; the company went on record against the closed shop clause when it was insisted upon by the C. I. O. people in the settlement of the strike in January; the company opposed the clause in the present contract. I have no hesitation in stating that I have never found any fair minded student of union labor problems who approved of the proviso in Section 8 (3) of the Act.

It seems to me that there may be some retributive justice in having this clause in the Act boomerang against [fol. 1058] its own advocates and, unfortunately, I can not agree with your construction of the Act, much as I would like to reach the same conclusion. We are studying the authorities, and in the meantime, for the record, I am writing to Mr. Ritchie, counsel for the Richwood Union, asking him to let me know about their efforts pursuant to our conversation of yesterday.

Very truly yours, ——— ———

RWC:O.
CC Chas. Ritchie.
CC M. B. Wallace.

[fol. 1057] RESPONDENT WALLACE CORPORATION'S EXHIBIT 29

(National Labor Relations Board Seal)

National Labor Relations Board
Ninth Region
U. S. Post Office and Courthouse
Cincinnati, Ohio

March 21, 1942.

R. W. Chubb, Esq.
Lewis, Rice, Allen and Chubb,
208 North Broadway,
St. Louis, Mo.

Re: The Wallace Corporation
Case No. IX-C-1601

CHUBB:

Res ipsa loquitur.

Very truly yours, Philip G. Phillips, Regional Director.

PGP:GF
encl.

[fol. 1058] (ATTACHED TO EXHIBIT 29)

March 21, 1942.

Mr. B. E. Thompson,
Richwood, W. Va.

DEAR MR. THOMPSON:

Re: Wallace Corporation
Richwood, W. Va.
Case No. IX-C-1601

Charges have been filed in this office alleging that the Wallace Corporation has discharged some thirty-odd individuals because they were not members of your union. It develops that your union is unwilling to accept them into membership. I need not remind you of the seriousness of these charges.

The company has indicated its willingness to attend a conference at my office on Thursday, March 26, 1942 at

10:00 A. M. I would appreciate very much your attendance, and your wiring me collect whether or not you will be here.

Yours very truly, Philip G. Phillips, Regional Director.

PGP GF.

[fol. 1059] BOARD'S EXHIBIT No. 2

(Western Union Telegram)

St. Louis, Mo.
January 23, 1942.

B. E. Thompson
Nicholas Republican
Richwood, W. Va.

Answering your inquiry concerning the statement recently made by me in Cincinnati about having a source of logs available. It is true that I do have sources available in both Michigan and Wisconsin where we own an inactive clothespin and dish manufacturing plant which could be economically started up within a reasonable time with machinery already there and by transferring some of the equipment in our Richwood plant.

M. B. Wallace, Jr.

BOARD EXHIBIT 4

ONE CENT STAMP

THIS SIDE OF CARD IS FOR ADDRESS

M. B. WALLACE, JR.,
The Wallace Corporation,
Richwood, West Virginia.

The Company has repeatedly suggested that the factory be reopened pending an orderly determination of differences concerning representation. So that we may decide when to reopen, please check one of the following statements below indicating your wishes. No signature is necessary, and neither Union nor the Company will know how you have voted. PLEASE MAIL THIS CARD PROMPTLY.

☐ I want to return to work as soon as possible.
☐ I do not want to return to work.

THE WALLACE CORPORATION.

(Mailed 12/23/41.)

[fol. 1060] BOARD'S EXHIBIT No. 5

United States of America

Before the National Labor Relations Board
Ninth Region

IX-C-1478

In the Matter of WALLACE CORPORATION RICHWOOD, W. VA. and UNITED CONSTRUCTION WORKERS ORGANIZING COMMITTEE. Date filed October 10, 1941.

Second Amended Charge

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that Wallace Corporation of Richwood, W. Va. has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsections (1) and 2 and 3 of said Act, in that Harvey Dodrell was discharged on or about August 26, 1941 for Union activities. A campaign of organization is in progress in Richwood by District #50, United Mine Workers of America and the United Construction Workers Organizing Committee, organizing the factories, sawmill and timber workers, and concerted action is being taken by the employers to stop the organization campaign.

By the acts set forth in the paragraph above and by other acts and conduct, it, by its officers, agents, and employees interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the said Act.

Officers of the Wallace Corp. are sponsoring aiding and abetting a company union.

[fols. 1061-1062] The undersigned further charges that said unfair practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the name and official position of the person acting for the organization.)

(S) Geo. J. Titlen, United Construction Workers Organizing Committee, 703 A. Virginia St. E. Charleston, W. Va.

Subscribed and sworn to before me this 9 day of October, 1941, at Charleston, W. Va. (S.) W. J. Daugherty, County of Kanawha, State of West Virginia. My commission expires 4 23 45.

[fol. 1963] BEFORE THE NATIONAL LABOR RELATIONS BOARD, NINTH REGION

Case No. IX-C-1601

In the Matter of THE WALLACE CORPORATION and B. E. THOMPSON and LOCAL UNION No. 129, UNITED CONSTRUCTION WORKERS ORGANIZING COMMITTEE.

ANSWER OF INTERVENOR, RICHWOOD CLOTHESPIN AND DISH WORKERS UNION, A CORPORATION, TO THE COMPLAINT OF THE NATIONAL LABOR RELATIONS BOARD, CASE No. IX-C-1601.

Richwood Clothespin and Dish Workers Union, a Corporation, hereinafter designated as "Intervenor", for answer to the complaint of the National Labor Relations Board, Case No. IX-C-1601, answering says:

I

That it is a labor union within the meaning of Section 2, subdivision (5) of the National Labor Relations Act; that it is a West Virginia corporation organized and existing under and by virtue of the laws of the State of West Virginia, having its principal office and residence in the City of Richwood, West Virginia; that it is a non-[fol. 1964] profit, non-stock corporation organized and existing for the benefit of the employees of The Wallace Corporation at Richwood, West Virginia, and is a labor union within the meaning of the National Labor Relations Act; that it has been chosen by a majority of the employees of the Wallace Corporation at its plant at Richwood, West Virginia, as their exclusive collective bargaining agency pursuant to an election conducted by agents of the National Labor Relations Board; that as such exclusive bargaining agency it has entered into a working agreement with The Wallace Corporation relative to hours of labor, rates of pay, and other working conditions of said employees, which said

agreement is now in full force and effect; and that all of the employees of said Wallace Corporation at its Richwood plant are members of said Union.

II

That it is not advised as to the correctness or incorrectness of the allegations contained in Paragraphs 1, 2 and 3 of said complaint.

III

That it denies that portion of the allegations contained in paragraph 4 of said complaint to the effect that the United Construction Workers Organizing Committee and Local No. 129 thereof, affiliated with the Congress of Industrial Organizations, therein called the "United", is a labor organization within the meaning of Section 2 (5) of the National Labor Relations Act, but admits the allegations contained therein to the effect that the Richwood Clothespin and Dish Workers Union, therein called the Independent, is a labor organization within the meaning of said Section 2(5) of said Act.

[fol. 1065]

IV

Intervenor denies the allegations contained in Paragraphs 5, 6, 7, 8, 9 and 10 of said complaint.

V

Intervenor denies the averments contained in Paragraph 11 of said complaint, except the averment to the effect that the Wallace Corporation in discharging the employees named therein purported to act upon an agreement entered into between itself and the "Independent", which agreement provided that all its employees must be members of the "Independent".

VI

Intervenor likewise denies the correctness of the conclusions set forth in Paragraphs 12, 13, 14, 15 and 16 of said complaint.

VII

That the said Local Union No. 129, United Construction Workers Organizing Committee heretofore filed

another unfair labor practice charge against the said Wallace Corporation, but that said charge was later withdrawn and a consent election held under the direction of the National Labor Relations Board for the purpose of enabling the nonsupervisory employees of The Wallace Corporation at Richwood, West Virginia, to determine by secret ballot their exclusive collective bargaining agency, if any they desired; that pursuant to agreement between The Wallace Corporation, the employer, Local Union No. 129, United Construction Workers Division of District 50, United Mine Workers of America, and the Richwood [fol. 1066] Clothespin and Dish Workers Union, a Corporation, an independent employees' union composed of nonsupervisory employees of The Wallace Corporation, of Richwood, West Virginia, with the consent and approval of Philip G. Phillips, Regional Director for the National Labor Relations Board, Ninth Region, the said Richwood Clothespin and Dish Workers Union aforesaid was thereby recognized as a labor union within the meaning of the National Labor Relations Act and placed upon the ballot to be used at said consent election, together with that of the Local Union No. 129 aforesaid; that at the election so held the said employees chose as their exclusive collective bargaining agency the said Richwood Clothespin and Dish Workers Union; that the result of said election was properly certified to the National Labor Relations Board as provided by law, and such organization was thereafter officially declared and recognized as the exclusive bargaining agency of the employees aforesaid, and acting under authority conferred by the National Labor Relations Act, said Richwood Clothespin and Dish Workers Union entered into a working agreement with The Wallace Corporation concerning wages, hours of labor and conditions of employment, which said contract is now in full force and effect; that pursuant to authority conferred by the said National Labor Relations Act a union shop provision was included in said working agreement; that the persons named in Paragraph 11 of the complaint aforesaid and alleged to have been discharged by The Wallace Corporation because they were members of the United and because they were not members of the Independent, were, in fact, discharged by virtue of said union shop provision as a result of their not being members of the said Richwood Clothespin and Dish Workers Union; that one of the provisions of the agree-

[fol. 1067] ment whereby the said election was held related to a union shop provision and that the said Local Union No. 129 refused to agree to such consent election unless it was stipulated that in the event that the said Local Union No. 129 should be chosen as the exclusive bargaining agency for said employees, that a union shop provision would be inserted in the working agreement requiring all employees of the said Wallace Corporation to be members in good standing of said Local No. 129; that having withdrawn the original unfair labor practice charges and having admitted the legality of the Richwood Clothespin and Dish Workers Union as a labor union and having insisted upon a union shop provision prior to the election aforesaid, the said Local No. 129 and the National Labor Relations Board are now estopped from questioning the validity of said election, the validity of the Richwood Clothespin and Dish Workers Union or the contract made by it with The Wallace Corporation pursuant to its selection as bargaining agency by The Wallace Corporation employees in the election aforesaid.

VIII

Respondent further says that under the provisions of Article III, Section 9, of the Rules and Regulations, series 2 as amended, adopted and promulgated by the National Labor Relations Board, it is provided that upon the conclusion of an election held by the Board to permit employees to select their bargaining agency by secret ballot, the agent conducting the election shall prepare an election report containing a tally of the ballots, his rulings, if any, upon challenged ballots, and his findings and recommendations which he shall cause to be served upon the parties; that within five days thereafter the *the* parties may file [fol. 1068] with the agent conducting the ballot an original and three copies of objections to the conduct of the ballot or the election report and that if no objections are filed, the agent conducting the ballot shall forward to the Board in Washington, D. C., his election report, which, together with the record previously made, shall constitute the record in the case. Intervenor says that no objections were filed by any party to the election or agent's report therein within the five day period aforesaid; and that the requirement of said Rule cannot be avoided or set aside, particularly after the execution of a working agreement by the em-

ployees chosen at such election by now permitting the filing of an unfair labor practice charge based upon acts alleged to have been committed prior to the holding of said election.

IX

That the charge upon which the above complaint is based was not made in good faith and that no bona fide controversy with reference to unfair labor practices existed between the said Wallace Corporation and its employees; that the purpose of said Local No. 129 in filing said charges was to cause the said Wallace Corporation to require its employees, in violation of the National Labor Relations Act, to join said Local and to compel the said employer to recognize it as the exclusive collective bargaining agency of said employees, regardless of their desires and contrary to their wishes in reference thereto, and regardless of the fact that a large majority of said employees had designated the said Richwood Clothespin and Dish Workers Union as their sole collective bargain agency and desired it to act as such; that on account of the unlawful acts and conduct of the officers, agents and members of said Local and the officers, agents and members of the United Con- [fol. 106] struction Workers Organizing Committee, of which said local was an affiliate, hereinafter set out, said Local could not be recognized as a labor union within the meaning of the National Labor Relations Act competent to function as the exclusive collective bargaining agency for said employees, and as a result thereof no valid complaint could be issued by the National Labor Relations Board upon charges filed by said Local.

Among specific instances of lawlessness and violence by the officers, agents and members of said Local and said United Construction Workers Organizing Committee may be mentioned the following:

1. That prior to the calling of a strike at the plant of The Wallace Corporation at Richwood, certain organizers of said Local and said United Construction Workers Organizing Committee, to-wit, Thurman Farmer and Bill Estep, through the use of a loud speaker or public address system, sought to intimidate the employees of said Wallace Corporation by stating that their organization would bring in high powered rifles and shoot employees who might attempt to work during the strike.

2. That the Cherry River Boom and Lumber Company, a Corporation, operates a large sawmill and lumber plant in the Town of Richwood, a short distance from the plant of The Wallace Corporation; that shortly after a strike was called at the plant of The Wallace Corporation, a strike was also called by said United Construction Workers Organizing Committee at the lumber plant; that after said strike had been called and after the United States had declared war against Japan, following the Pearl Harbor incident which aroused the indignation and stimulated the patriotism of all loyal American citizens, a large majority [fol. 1070] of the employees of said Lumber Company requested and demanded the right to return to work, Intervenor says, upon information and belief, and here charges the same to be true, that they were fired upon from ambush by agents of said Local and said Committee, who used high powered rifles from which one hundred or more shots were fired, some of the bullets entering the offices and mill of said Company and some entering a public school building and private homes in the City of Richwood; that the signal to commence firing was given by agents of said Local and said Committee at its picket house by lowering a United States flag which had been raised above the street adjacent thereto.

3. That similar instances of shooting occurred thereafter both in the day time and in the night time; that six persons arrested by local law enforcement officers on charges connected with the shooting were released upon bail, which bail was arranged for by officers and agents of said Committee; that two of said Committee's organizers, Bill Estep and Thurman Farmer, were arrested at the Committee's picket house shortly after said firing of high powered rifles and there was found upon the person of said Farmer high powered rifle ammunition of the same type which had been used in the firing.

4. That since the calling of said strike and after the said Cherry River Boom and Lumber Company had resumed work, its log trains were fired upon from ambush on several occasions, and several known sympathizers of said Local and the said Committee have been indicted in Webster County, West Virginia, on charges of attempted murder in connection with said shooting, and likewise several known sympathizers of said Local and

said Committee have been indicted in Nicholas County for [fol. 1071] participation in the unlawful acts hereinbefore mentioned and described.

5. That the railroad of said Cherry River Boom and Lumber Company has been dynamited, and a known sympathizer of said Committee, has been indicted for such dynamiting.

6. That said Committee's organizer, Bill Estep, has been indicted, tried and convicted in the Circuit Court of Webster County for having unlawfully carried a pistol in connection with his activities as such organizer.

7. That an automobile belonging to a member of the Richwood Loggers and Lumberman's Union, an independent union of the Cherry River Boom and Lumber Company's employees, was dynamited, and those responsible therefor escaped from the scene of the dynamiting by using an automobile registered in the name of a Committee sympathizer.

8. That a Committee sympathizer has been tried and convicted in the Circuit Court of Nicholas County, West Virginia, for having maliciously wounded a member of the Richwood Loggers and Lumbermen's Union, which wounding occurred in connection with an affray in which the Committee's adherents and sympathizers broke up a meeting of adherents and sympathizers of said independent union.

9. That thirteen sympathizers of said Committee have been indicted in the Circuit Court of Nicholas County upon the charge of conspiracy to damage and destroy the property belonging to a member of the Richwood Loggers and Lumbermen's Union.

10. That a gas shell was fired or thrown into a room where the members of said Richwood Loggers and Lumbermen's [fol. 1072] Union were holding a meeting, and that stones have been thrown through the windows of homes of a number of citizens in the City of Richwood who were thought to be unfriendly to said Committee.

11. That on the morning of December 15, 1941, pursuant to the announced intention of The Wallace Corporation, through its manager, to reopen its plant, a number of the employees of said Wallace Corporation, approximately

twenty in number, attempted to re-enter the plant and pursue the duties of their employment, and in order to safeguard them to some extent from being fired upon in like manner as the Cherry River Boom and Lumber Company employees had experienced, one of said employees carried an American flag with the intent and purpose of causing possible agents or confederates of the said Local and United to desist from firing upon the National Emblem, and when the employee who was carrying the flag and other employees with him approached the entrance to the plant of The Wallace Corporation, they were met at said entrance by a large number of associates of said Local and United, one of whom J. E. Bashaw by name, who had for some time been acting in the capacity of a picket in behalf of said Local No. 129 and said Committee, seized the flag which was carried by said employee and wrested it from him; that said employees were told by said associates that they could not return to work and addressed the employees by the use of insulting epithets such as "scabs" and "yellow dogs" and in some instances assaulting and administering physical violence to such employees who were seeking to return peaceably to their place of employment; that as a result of said threats, force and violence, said employees suspended their efforts to return to their employment.

[fol. 1073] 12. That numerous shots were fired from high powered rifles into the plant of said Wallace Corporation after the calling of the strike aforesaid, and Respondent says, upon information and belief, and here charges the same to be true, that said shots were fired by agents and representatives of said Local and said Committee.

13. That said Local and said Committee, through its officers, agents and members, has generally threatened and terrorized not only the employees of said Wallace Corporation, but has threatened and terrorized many citizens and residents of said City of Richwood, who are not employees of said Company and have no connection with either said Committee or the Richwood Clothespin and Dish Workers Union.

Wherefore, Intervenor prays that the Board find that said Local No. 129 and the said United Construction Workers Organizing Committee on account of the illegal acts aforesaid be held not to be a labor organization within the

ing of the National Labor Relations Act authorized to file a valid charge under the provisions thereof and that they be held to be disqualified to act as the bargaining agency for the employees of the Wallace Corporation at its plant at Richwood, West Virginia, and likewise disqualified from filing a charge of unfair labor practices against the said Wallace Corporation and B. E. Thompson upon which the Board can issue a complaint, and that upon consideration of all the allegations contained in Intervenor's answer that said Case No. IX-C-1601 be dismissed, and that Intervenor be held to be the valid, existing exclusive bargaining agency for the said employees of The Wallace Corporation, and that the working agreement between it and the said Wallace [fol. 1974] Corporation be held to be a valid and enforceable agreement binding upon the parties thereto, and that the Board do grant unto Intervenor such other and further relief as to it may seem proper.

Richwood Clothespin and Dish Workers Union, a Corporation, by Carm Reese, President, Richwood, West Virginia.

Ritchie, Hill & Thomas, Chas. Ritchie, Counsel for Intervenor, Security Bank Building, Charleston, West Virginia.

Duly sworn to by Carm Reese. Jurat omitted in printing.

[fol. 323] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5135

THE WALLACE CORPORATION, Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD, LOCAL NO. 129, UNITED CONSTRUCTION WORKERS' ORGANIZING COMMITTEE, and Richwood Clothespin & Dishworkers Union, Respondents

On Petition for Review of an Order of the National Labor Relations Board

July 16, 1943, petition for review of an order of the National Labor Relations Board is filed and the cause is docketed.

Note: The petition for review is in the words and figures following, to wit:

[fol. 324] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

THE WALLACE CORPORATION

vs.

NATIONAL LABOR RELATIONS BOARD, LOCAL NO. 129, UNITED CONSTRUCTION WORKERS' ORGANIZING COMMITTEE, and Richwood Clothespin & Dishworkers Union

Petition for Review of Order of the National Labor Relations Board

To the Honorable The Judges of the United States Circuit Court of Appeals for the Fourth Circuit:

The Petition of The Wallace Corporation respectfully represents:

Nature of the Proceedings

1. That this is a Petition for Review of an Order dated June 7, 1943, of the National Labor Relations Board (hereinafter called the Board), made and entered in a proceeding under Section 10 of the National Labor Relations Act,

wherein the Board filed a complaint (Case C-2321), dated June 25, 1942, against The Wallace Corporation (hereinafter called the Petitioner), and one B. E. Thompson as respondents, based upon charges of Local Union No. 129, United Construction Workers Organizing Committee (here-
[fol. 325] inafter called the Union), alleging that your Petitioner, The Wallace Corporation, had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1), (2) and (3) and Section 2 (6) and (7) of the National Labor Relations Act. The said complaint as amended alleged that the Petitioner interfered with and discouraged employees at its plant at Richwood, W. Va., with respect to their membership and activities in the Union and that your Petitioner sponsored and encouraged a union known as the Richwood Clothespin and Dish Workers Union, Intervenor in the Proceedings before the Board (hereinafter called the Independent), and contributed to its support and further alleging that on or about March 18, 1942, your Petitioner, purporting to act pursuant to an alleged labor contract between itself and the Independent, discharged and thereafter refused to reinstate forty-three named employees of Petitioner because they were members of the Union and because they were not members of the Independent, and, further, that the said labor contract, if it existed, was illegal and void. Your Petitioner filed an answer controverting the allegations of the complaint and, in addition to the said answer, filed a motion to dismiss the complaint of the Board, setting forth in said motion the following undisputed facts:

That beginning September 25, 1941, the Union had called a strike at Petitioner's said plant at Richwood, West Virginia, which lasted until January 13, 1942; that during the pendency of said strike, substantially the same charges of interference and domination had been made before the Board by the Union and investigated by the Board; that said issues had been settled by agreement, with the knowledge of the Board; that on or about January 13, 1942, a settlement agreement had been entered into between your Petitioner, the Union and the Independent, terminating the strike and pro-
[fol. 326] viding for a consent election to be conducted by the Board to determine the authorized bargaining representatives of the employees of Petitioner; that

on January 19, 1942, a consent election agreement was entered into by and between the Petitioner, the Union and the Independent with the approval of the Board; that on the same day the Petitioner and the Union entered into an agreement, which was participated in by an agent of the Board and approved by the Board's Regional Director, which agreement by its terms, among other things, provided that the Union would withdraw the charge pending against the Petitioner; that the Union requested and was granted by the Board's Regional Director the withdrawal of the charge pending against Petitioner; that thereafter, on January 30, 1942, an election was conducted by the Board and the count of the ballots showed that the Independent received a majority of the votes cast; that no objections were filed by the Union or the Board as to the conduct of said election, and on or about February 4, 1942, said Independent was duly certified by the Board as the exclusive bargaining representative for the employees of Petitioner; that thereafter, without objection from any source, Petitioner entered into collective bargaining negotiations with the Independent and on March 7, 1942, entered into a contract with the Independent containing (against Petitioner's protest) a closed shop clause (that is, requiring all employees of the Petitioner to become members of the Independent), Petitioner having been bound to enter into said closed shop agreement by the terms of the settlement agreement of January 13, 1942, above mentioned; that on or about March 17, 1942, it appearing that certain employees of Petitioner were not members of the Independent, the same were laid off by Petitioner at the insistence of the Independent, pursuant to the terms of the said contract with the Independent.

2. The case was heard at Summersville, West Virginia, from July 9 through July 15, 1942, before William E. Spencer, Esq., Trial Examiner designated by the Board. After admission in evidence of the above-mentioned agreements, certification and labor contract as aforesaid, and upon hearing said motion to dismiss, the same was overruled by the Board and the hearing proceeded, after due exceptions, upon the pleadings. Said Trial Examiner

[fol. 327]

issued his intermediate report dated September 2, 1942, and thereafter, on September 4, 1942, the matter was, by order of the Board, transferred to the Board, and upon exceptions of Petitioner herein to the said intermediate report and brief in support of said exceptions, oral argument was held before the Board in Washington on November 17, 1942. Thereafter, on or about February 27, 1943, the Board made and entered its Decision and Order, copy of which Decision and Order, marked Exhibit A, is attached hereto and made a part hereof. Thereupon this Petitioner, on or about April 5, 1943, filed a Petition for Review of the said order of the Board. Subsequently and prior to the filing of the transcript of the record of said case in this Court, the Board entered an order dated May 1, 1943, vacating its said order of February 27, 1943, and setting May 13, 1943, for reargument of the case; that on or about May 7, 1943, the said Board filed its Motion in this Court for dismissal of the said Petition for Review, and upon said motion this Honorable Court dismissed the same by an order dated June 7, 1943; that following reargument of the case on May 13, 1943, said Board made and entered its Decision and Order dated June 7, 1943, copy of which is hereto attached and marked Exhibit B.

[fol. 328] Facts and Statutes Upon Which Venue Is Based

3. Your Petitioner avers that it is a person aggrieved by the above mentioned order of the said National Labor Relations Board, dated June 7, 1943, within the meaning of Section 10 (f) of the National Labor Relations Act [Section 160 (f), Title 29, U. S. C.]; that the above-mentioned order of the said National Labor Relations Board, dated June 7, 1943, is a final order of the said Board; that this Petition for review is authorized and provided for by the said Section 10 (f) of the National Labor Relations Act, providing for review of any such order in the Circuit Court of Appeals in the United States in the circuit wherein the unfair labor practices in question were alleged to have been engaged in or wherein such person resides or transacts business.

4. Your Petitioner avers that it is a Missouri corporation with an office in the County of St. Louis, State of Missouri, maintaining and operating a plant for the manufacture of clothespins and wood and paper dishes and

food trays at Richwood, in the County of Nicholas, State of West Virginia, within the Fourth Judicial Circuit of the United States, and that all of the facts and circumstances involved in these proceedings arose out of the operation of the said plant within the said Fourth Judicial Circuit and within the jurisdiction of this Honorable Court. That your Petitioner is duly authorized to transact and does transact business in the State of West Virginia as aforesaid.

Relief Prayed

5. Your Petitioner respectfully prays that the said Decision and Order of the Board of June 7, 1943, in said case C-2324, be set aside and vacated.

[fol. 329] Points on Which Petitioner Intends to Rely

6. The points upon which your Petitioner intends to rely in this review are as follows:

Errors in Rulings of the Board

(1) The Board erred in sustaining the ruling of the Trial Examiner in overruling the motion of the Petitioner to dismiss the complaint upon which the said Decision and Order is based.

(2) The Board erred in sustaining the Trial Examiner's ruling in overruling the Company's objection to the introduction of evidence as to events occurring prior to the time of the strike settlement agreement dated January 13, 1942.

(3) The Board erred in sustaining the Trial Examiner's ruling in denying the Company's Motion to strike from the record all of the testimony adduced in the course of the Board's case except that relating to facts and circumstances following the election conducted by the Board.

(4) The Board erred in sustaining the ruling of the Trial Examiner denying the Company's Motion to strike out all of the Board's evidence on the ground that it is insufficient to sustain the charges set forth in the complaint.

(5) The Board erred in sustaining the ruling of the Trial Examiner in denying Company's motion to dismiss the complaint at the close of the entire case.

(6) The Board erred in sustaining the Examiner's ruling denying Company's motion, made at the close of the case, to strike from the record all testimony adduced on behalf of the Board except that relating to facts and circumstances following the election held by the Board.

[fol. 330] Errors in Findings With Respect to Events Preceding Settlement Agreement

(7) The Board erred in its finding, under the heading of "Conclusions", that "management representatives sent employees to the Union's first organizational meeting with instructions to oppose association of respondent's [Petitioner's] employees with a national affiliated labor organization", for the reason that there is no evidence in the record to support the said finding.

(8) The Board erred in finding that "during negotiations with the Union in September, 1941, plant manager Davis . . . proposed among other things that management representatives interrogate employees concerning their desires with respect to representation by the Union for the purposes of collective bargaining", for the reason that said finding is not supported by the evidence.

(9) The Board erred in its finding, referring to the first paragraph of its section (d) "Conclusions", that "in this atmosphere a strike occurred", for the reason that the antecedent findings referred to wholly ignore uncontroverted testimony that the management, prior to the strike, informed the Union that it would recognize and negotiate with whatever union was proven by a Labor Board election to be the representative of a majority of its employees, and for the further reason that the said statement and finding of the Board is unsupported by the evidence.

(10) The Board erred in finding that Lindy Groves, Carm Reese and Ancil Smith were supervisory employees, for the reason that said finding is not supported by any evidence.

(11) The Board erred in finding that the Independent lent itself to the respondent [Petitioner] as an aid in the back-to-work movement in opposition to the Union, for the reason that the said finding is not supported by any evidence in the record.

[fol. 331] (12) The Board erred as a matter of law in finding that the Petitioner dominated and interfered with the formation and administration of the Independent and has contributed support thereto, for the reason that the charges upon which such alleged domination and interference were based were withdrawn pursuant to a settlement agreement approved by the Board and no charges of such domination and interference were before the Board at the time of its decision herein complained of.

(13) The Board erred as a matter of law in finding that the alleged domination, interference with and support of the Independent by the Petitioner and continued recognition of the Independent as the bargaining representative for its employees constitute a continuing obstacle to the free exercise by its employees of their right of self-organization and to bargain collectively through representatives of their own choosing, for the reason that the said finding is inconsistent with the prior action of the Board in recognizing the said Independent as a labor organization, placing its name upon the ballot for the purpose of determining by election the authorized representative of Petitioner's employees and is inconsistent with the certification by the Board of the Independent as the authorized representative of Petitioner's employees for collective bargaining purposes.

(14) The Board erred in its finding of fact and conclusion that the Petitioner dominated and interfered with the formation and administration of and contributed support to the Independent and interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act—for the reason (a) that all charges of such unfair labor practices occurring prior to the time of the strike settlement and consent election agreements had been withdrawn with the consent of the Board and were not properly before the Board, and (b) the Board, by recognizing the Independent as a labor organization within the meaning of the Act and by placing its name upon the [fol. 332] ballot in the election conducted by the Board was, by such acts on its part precluded from reopening the issues covered by such settlement, and for the further reasons that with respect to said alleged unfair labor practices after the date of said settlement agreements

there is no substantial evidence in the record to support the said finding.

(15) The Board erred in its finding of fact and conclusion that "the effects and consequences of the Petitioner's alleged domination, interference with, and support of the Independent, as well as the continued recognition of the Independent as a bargaining representative for its employees, constitute a continuing obstacle to the free exercise by its employees of their right to self organization and to bargain collectively through representatives of their own choosing," and "because of Petitioner's illegal conduct with regard to the Independent, it is incapable of serving the Petitioner's employees as a genuine collective bargaining agency," and "that the continued recognition of the Independent would be obstructive of the free exercise by the employees of the rights guaranteed to them by the Act"—for the reason that there is no substantial evidence in the record to support the aforesaid finding and conclusion or any part thereof and the same is erroneous as a matter of law.

Errors of Fact and Law With Respect to Discharge of 43 Nonmembers of Independent Under Its Closed Shop Contract

(16) The Board erred in finding that the closed shop contract with the Independent dated March 7, 1943, was, to the knowledge of the Petitioner, "designed to operate as an instrument for effecting discrimination" against respondent's employees "solely because of their prior union activities," and likewise erred in finding that in executing said closed shop contract the Petitioner "acquiesced in a scheme to penalize employees whose choice of representatives was [fol. 333] not that of a majority"; and likewise erred in finding that the Petitioner was put on notice that the real purpose of the said closed shop agreement "was to bar from future employment with respondent, persons who had adhered to the charging union in the election campaign" and that the Petitioner "knowingly" became "a party to the Independent's plan to eliminate from the respondent's payroll employees solely because of their past union activities," for the reason (a) that the said findings and each of them are wholly unsupported by any evidence in the record, and for the further reason (b) that the evidence shows to the

contrary that the Petitioner reemployed all of its employees after the strike settlement regardless of union affiliation and that thereafter in its negotiations with the Independent Petitioner protested the closed shop clause and sought at all times to mitigate the effect of its prior agreement to make a closed shop contract, and sought at all times thereafter to induce the Independent to permit the employment or reemployment of the excluded employees; and (c) for the further reason that (as was at all times well known to the Board and admitted in its findings) Petitioner was bound to enter into said closed shop contract by its strike settlement agreement, regardless of which union prevailed in the election, and (d) for the further reason that the Independent had already been designated as collective bargaining representative of the employees, and it is the decision of the Board, not the action of the Petitioner, that now deprives them of their statutory rights, already exercised under Board supervision.

(17) The Board is in error in its statement that the letter of Thompson to the Petitioner dated February 28, 1942, demanded that the Petitioner enter into a closed shop contract with the Independent "in order to permit elimination from the respondent's payroll of employees unfavorable to the Independent and thereby perpetuate the Independent as the exclusive bargaining representative in the plant," [fol. 334] for the reason, first, that the said letter insisted merely upon performance by the Petitioner of its legal obligation to enter into such a contract, and, second, that it was directed primarily to the employment by the Petitioner of new and additional employees not acceptable to the Independent, and, third, it disclosed merely the fact that with respect to such employees as Dodrill that the members of the Independent had voted unanimously that they would not work with them, for reasons undisclosed, and, lastly, the said letter and other uncontroverted evidence shows that the Petitioner, far from acquiescing in the said demand, had protested the closed shop contract and never agreed to the position taken by Thompson in said letter.

(18) The Board erred in its finding that the Petitioner discharged 43 employees named in Appendix A because of their membership in and activities on behalf of the Union, for the reason that there is no evidence in the record to support the said finding or any part thereof.

(19) The Board erred in finding that the contract entered into between the Petitioner and the Independent and the contractual relationship existing thereunder have been the means whereby the Petitioner has utilized an employer-dominated labor organization to frustrate self organization and defeat genuine collective bargaining by its employees, for the reason that the said finding is not supported by any evidence in the record.

(20) The Board erred in ordering the Petitioner to cease giving effect to the contract between it and the Independent or to any modification or extension therefor, for the reason that the said contract was entered into between the Petitioner and the Independent after certification of the said Independent as collective bargaining agent for its employees, such certification being made by the authorized representatives of the Board and the said Board is without jurisdiction to nullify the said contract, and for the further [fol. 335] reason that such nullification of the said contract is not authorized by law.

(21) The Board erred as a matter of law in ordering reinstatement of the 43 employees named in the order and to make them whole for any loss of pay they may have suffered by reason of their discharge, for the reason that said employees were discharged pursuant to a closed shop agreement entered into by the Petitioner with a labor union duly certified by the Board as the authorized representative of the employees of the Petitioner for the purposes of collective bargaining and that such contract was lawful and valid as a matter of law.

(22) The Board and the Union are as a matter of law estopped from questioning or attacking either the validity of the agreement entered into by and between the petitioner and the Independent on March 7, 1942, or the legality of the act of the Petitioner in discharging the 43 named employees pursuant to the provisions of said contract, for the reason that (a) the Union was a party to and the Board was apprised of the terms and provisions of the settlement agreement of January 13, 1942, whereby Petitioner agreed to enter into a union shop agreement of the tenor and effect of the contract of the Petitioner with the Independent now complained of, with whatever labor organization was selected pursuant to the election; that said stipulation was

entered into by the Petitioner at the insistence of the Union (so that if the Union had been certified as the bargaining representative after the election said Union would have benefited thereby) and the Petitioner changed its position and acted upon said agreement; and (b) the Union and the Board at the time of making said settlement agreement, had knowledge prior to the settlement agreement of all of the substantial facts adduced at this hearing (the Board admits in its findings that "during the period between November 1, 1941, and January 12, 1942, a series of conferences took place in which Board agents and interested parties partici-[fol. 336] pated to settle the pending charges of unfair labor practices"; furthermore, the principal evidence of alleged unfair labor practices in this case were upon the testimony of witness Dodrill and witness Griffie, both of whom were officers of the Union and their knowledge must be charged to the Union); (c) the Board had full knowledge by its own investigation prior to the settlement agreement of all the substantial facts adduced in this hearing and with such knowledge certified the Independent as the exclusive bargaining agent for the petitioner's employees, and the Union, after participating in said election and with full knowledge of the facts now adduced before the Board, failed to object to the election and certification and Petitioner changed its position in reliance upon such settlement, certification and failure of the Union to object, by entering into the contract now complained of; and (d) the Union failed to file any charge against the Petitioner until long after the certification of the Independent as authorized and exclusive bargaining agent for Petitioner's employees and made no objection whatever to such certification until some time after Petitioner in reliance thereon had entered into the said closed shop contract with the Independent.

(23) The Board was in error in setting aside its own certification of the Independent as collective bargaining agent and in holding for naught and invalidating the contract of March 7, 1942, between the Petitioner with the Independent for the following reasons: (a) It is contrary to equity and good conscience and defeats the purpose of the National Labor Relations Act for the Board to repudiate its own acts, or settlements approved by it, in the absence of a showing of fraud or concealment or other conduct constituting an imposition upon the Board. (b) The Board had full knowledge at the time that the consent election agreement was

entered into and at the time of certification by the Board that the Petitioner was under a legal obligation to enter [fol. 337] into a union shop agreement with the prevailing union. (c) The Board now finds that the alleged conduct of the Petitioner between the date of the settlement agreement and the election did not constitute interference justifying setting aside the settlement. (d) There is no evidence in the record of malice or illegal purpose on the part of the Petitioner, to support the Board in its conclusion that the act of the Petitioner in entering into the closed shop contract of March 7, 1943, in itself a legal contract with a certified union, was invalidated by supervening events.

In support of this point Petitioner will submit to the court and request the court to consider and review all of the evidence in the record with respect to the Petitioner's conduct and affecting the validity of the settlement agreements, the Board's certification and the above mentioned contract of March 7, 1942, without limitation of the scope of review pursuant to Section 10 (e) of the National Labor Relations Act, for the reason that the said limitation may not be applied to permit the Board to pass upon and determine the validity and effect of its own acts, such as the certification by the Board in this case, without full review of the evidence in the record, and will contend that if said limitation is otherwise construed, so as to permit the Board to submit only such findings as it desires and conclusively determine the weight of the evidence affecting its own acts, and the validity of contracts based thereon, the said limitation is unconstitutional as a violation of the Fifth Amendment to the United States Constitution; that such a provision so applied is unconstitutional under the circumstances shown in this case, namely, that the Board filed the complaint and conducted the trial for the Union by its appointed attorneys; that the trial examiner who tried the facts, was appointed by the Board; and that the Board in determining the validity of its said certification may not rely upon its own findings merely supported by evidence. Under the require- [fol. 338] ments of due process, the validity of its own acts must be determined in accordance with the weight of the evidence as found by an impartial tribunal.

(24) The Board exceeded its authority by ordering that the Petitioner cease and desist from giving effect to its contract dated March 7, 1942, with the Independent, or to

any extension, renewal or modification thereof, or to any other contract or agreement between the Petitioner and the Independent which may now be in force—for the reason that said contract is a legal agreement entered into by and between the parties thereto in reliance upon the certification by the Board that the Independent had been designated the exclusive bargaining agent for the employees of the Petitioner.

(25) The Board exceeded its authority in ordering the Petitioner to disregard the provisions of its contractual obligations to the Independent by ordering Petitioner to offer the 43 named employees immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority and other rights and privileges, and to make whole the said employees for any loss of pay they may have suffered by reason of their being laid off by the Petitioner—for the reason that Petitioner was obligated under the terms of the settlement agreement dated January 13, 1942, to recognize as exclusive bargaining agency either the Union or the Independent, depending upon which union was proven by a vote conducted by the Board to represent a majority of its employees and further, to recognize a union shop; that relying upon the Board's certification of the Independent as the exclusive bargaining agent, the Petitioner entered into the contract of March 7, 1942, wherein it was obligated to the Independent to lay off those employees who were not members of the Independent, and said 43 employees were not members of the Independent.

[fol. 339] Other Errors in Conclusions of Law

(26) The Board erred as a matter of law in its finding and conclusion that by entering into the closed shop contract with the Independent with knowledge that the Independent intended to exclude employees from membership and by discharging employees denied membership in the Independent, the Petitioner violated the Act.

(27) The Board erred as a matter of law in finding that the Petitioner's closed shop contract with the Independent, dated March 7, 1942, falls outside the proviso of Section 8 (3) of the National Labor Relations Act and affords no protection to the discharge of employees pursuant to its provisions.

(28) The Board erred in finding that the Petitioner discharged the 43 employees named in Appendix A because of their alleged membership in and activities on behalf of the Union and because they did not belong to the Independent, and that the Petitioner discriminated with respect to their hire and tenure of employment and conditions of employment and thereby encouraged membership in the Independent and discouraged membership in the Union, for the reason that the said finding and conclusion is erroneous as a matter of law.

(29) The order of the Board included in said decision and order of June 7, 1943, is erroneous—for the reasons that:

(a) The said order and each and every part thereof is not supported by any substantial evidence,

(b) That said order and each and every part thereof is not justified or supported by the law,

(c) By said order and each and every part thereof the Board has exceeded its authority and the same is against the law.

(30) Your Petitioner respectfully asserts that it is aggrieved by the aforesaid Decision and Order of the National [fols. 340-341] Labor Relations Board and that it does except to the same for each and all of the reasons herein set forth.

Wherefore, your Petitioner respectfully prays: (1) That certified copies of this Petition be forthwith served upon the National Labor Relations Board and Local Union No. 129, United Construction Workers Organizing Committee, and upon Richwood Clothespin and Dishworkers Union, Intervenor; (2) that said National Labor Relations Board be required to certify for filing with the United States Circuit Court of Appeals for the Fourth Circuit a transcript of the entire record in case No. C-2321; (3) that the court order the stay of the Board's order during the pendency of this petition for review; (4) that said Decision and Order of the Board of June 7, 1943, in case No. C-2321 be set aside and vacated; (5) that your Petitioner have such other and fur-

ther relief as this Honorable Court may deem just and proper.

Respectfully submitted, R. Walston Chubb, 208 N. Broadway, St. Louis, Mo.; Brooks B. Callaghan, Richwood, W. Va., Solicitors for Petitioner.

Wolverton & Callaghan, Charles S. Glazer, Lewis, Rice, Tucker, Allen & Chubb, Of Counsel.

[fol. 342] EXHIBIT "A"

This exhibit is a copy of the decision and order of the National Labor Relations Board dated February 27, 1943, superseded by later decision upon rehearing, dated June 7, 1943, and is omitted by agreement of the parties.

EXHIBIT "B"

This exhibit is a copy of the decision and order of the National Labor Relations Board dated June 7, 1943. It is set out in full at the beginning of this transcript of the record and is therefore omitted here.

[fol. 343] Same day, to-wit, July 16, 1943, notification to respondents, together with copy of petition for review, transmitted, by mail, to Robert B. Watts, General Counsel, National Labor Relations Board, Washington, D. C.; Local No. 129, United Construction Workers' Organizing Committee, c/o Mr. C. Russell Turner, 703a Virginia Street East, Charleston, W. Va., and Richwood Clothespin & Dishworkers Union, Richwood, W. Va.

July 19, 1943, the appearance of Robert B. Watts, General Counsel, and Ernest A. Gross, Associate General Counsel, National Labor Relations Board, is entered for the respondents.

July 21, 1943, the appearance of R. Walston Chubb is entered for the petitioner.

July 22, 1943, the appearance of Brooks B. Callaghan is entered for the petitioner.

August 23, 1943, the transcript of record is filed.

[fol. 344] ANSWER OF THE NATIONAL LABOR RELATIONS BOARD AND REQUEST FOR ENFORCEMENT—Filed August 23, 1943

(Style of Court and Title Omitted)

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Fourth Circuit:

Comes now the National Labor Relations Board, herein called the Board, and pursuant to the National Labor Relations Act (49 Stat. 449, c. 372, 29 U. S. C., Sec. 151, *et seq.*), herein called the Act, files this answer and request for enforcement of the Board's order.

1. Answering the allegations contained in paragraphs 1 and 2 of the Petition for Review, the Board prays reference to the certified transcript of the record, filed herein, of the proceedings heretofore had herein, for a full and exact statement of the pleadings, evidence, findings of fact, conclusions of law, and order of the Board, and all other proceedings had in this matter.

2. The Board admits the allegations contained in paragraphs 3 and 4 of the Petition for Review.

3. The Board denies each and every allegation of error contained in paragraph 6, subsections (1) to (30) inclusive, of the Petition for Review.

4. Further answering, the Board avers that the proceed- [fol. 345] ings had before it, the findings of fact, conclusions of law, and order of the Board, were and are in all respects valid and proper under the Act.

Wherefore, having answered each and every allegation contained in the Petition for Review, the Board respectfully prays this Honorable Court that said Petition be denied insofar as it prays in paragraph 5 thereof and in the final paragraph on page 17 thereof that the Board's order be set aside and vacated and that petitioner shall have other and further relief.

Further answering, the Board, pursuant to Section 10 (e) and (f) of the Act, respectfully requests this Honorable Court for enforcement of its order issued against petitioner on June 7, 1943, in proceedings designated on the records of the Board as Case No. C-2321, entitled "In the Matter of The Wallace Corporation and B. H. Thompson and Local Union No. 129, United Construction Workers Organizing Committee."

In support of this request for enforcement of its order, the Board respectfully shows:

(a) Petitioner, a Missouri corporation, is engaged in business within this judicial circuit. This Court has jurisdiction of the Petition for Review herein and of this request for enforcement by virtue of Section 10 (e) and (f) of the Act.

(b) Upon proceedings had in said matter, as more fully shown by the entire record thereof, certified by the Board and filed with this Court herein, to which reference is hereby made, and including a complaint, answer, hearing for the purpose of taking testimony and receiving other evidence, Trial Examiner's report and exceptions filed thereto and brief filed in support thereof, and oral argument before the Board, as more fully shown by the certified record filed herewith, the Board on June 7, 1943, duly stated its findings of fact and conclusions of law, and issued its order directed to petitioner, its officers, agents, successors, and assigns. So much of the aforesaid order as relates to this proceeding provides as follows:

[fol. 346] Order

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, The Wallace Corporation, Richwood, West Virginia, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Dominating or interfering with the administration of, or contributing financial or other support to Richwood Clothespin and Dishworkers' Union, or to any other labor organization of its employees;

(b) Recognizing Richwood Clothespin and Dishworkers' Union as a representative of any of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment;

(c) Giving effect to its contract, dated March 7, 1942, with Richwood Clothespin and Dishworkers' Union, or to any extension, renewal, or modification thereof, or

to any other contract or agreement between the respondent and the said labor organization which may now be in force;

(d) Encouraging membership in Richwood Clothespin and Dishworkers' Union, or any other labor organization of its employees, and discouraging membership in Local Union No. 129, United Construction Workers Organizing Committee, affiliated with the Congress of Industrial Organizations, or any other labor organization of its employees, by discharging any of its employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment;

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining, or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Withdraw all recognition from, and completely disestablish, Richwood Clothespin and Dishworkers' Union as a representative of any of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment;

[fol. 347] (b) Offer the 43 employees named in Appendix A immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges;

(c) Make whole the 43 employees named in Appendix A for any loss of pay they may have suffered by reason of the respondent's discrimination against them, by payment to each of them of a sum of money equal to the amount which he normally would have earned as wages from the date of the discrimination

to the date of the respondent's offer of reinstatement, less his net earnings during said period;

(d) Post immediately in conspicuous places throughout its plant in Richwood, West Virginia, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a), (b), (c), (d), and (e) of this Order; (2) that it will take the affirmative action set forth in paragraphs 2 (a), (b), and (c) of this Order; and (3) that the respondent's employees are free to become or remain members of Local Union No. 129, United Construction Workers Organizing Committee, affiliated with the Congress of Industrial Organizations, and that the respondent will not discriminate against any employee because of membership in or activity in behalf of that organization;

(e) Notify the Regional Director for the Ninth Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith.

(c) On June 7, 1943, the Board's decision and order was duly served upon petitioner and all other parties.

(d) Pursuant to Section 10 (e) and (f) of the Act, the Board has certified and filed with this Court a transcript of the entire record in the proceeding.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this answer and request for enforcement, and of the filing of the certified transcript of the entire record in said proceeding, to be served upon petitioner, and that this Court take jurisdiction of the proceedings and of the questions to be determined therein, and make and enter upon the pleadings, evidence, and proceedings set forth in the entire record of said proceeding, and [fol. 348] upon so much of the order made thereupon set forth hereinabove, a decree denying the petition to review and set aside, and enforcing in whole said order of the Board, issued on June 7, 1943, and requiring petitioner and

its officers, agents, successors, and assigns to comply therewith.

Dated at Washington, D. C., this 21st day of August 1943.

Malcolm F. Halliday, Acting General Counsel, National Labor Relations Board.

[fol. 349] Appendix A

Myrtle Bennett
Ida Berry
Red Brashaw
Ella Brown
Loy Coffman
Jaunita Cogar
Kenneth Cruse
Nellie Curnes
Claudie Dean
Ellen Dean
Harvey Dodrill
Ora Dodrill
Roxie Dodrill
Dalla Dotson
Mary Facemeyer
Garnett Fraze
Cicero Godfrey
Carrie Griffie
W. D. Griffie
Glenna Hannah
Jimmie Harris
Harold Harris
Mabel Hinkle
Janie Hopkins
Gillie Lewis
Cecil Little
Ada Lockhart
Fannie Logar
Millie Logar
Gay McClure
Kelse Meadows
Lilly Mollhan
Eugene Moore
Dorothy Nutter
Jack Prescott
Mildred Ross
Ida Ruley
Pearl Stewart
Grace Trimble
Ray Tulker
Carl Williams
Hazel Williams
Bill Willison

[fol. 350] DISTRICT OF COLUMBIA, ss:

Malcolm F. Halliday, being first duly sworn, states that he is Acting General Counsel of the National Labor Relations Board, and that he is authorized to and does make this verification in behalf of said Board; that he has read the foregoing answer and has knowledge of the contents thereof; and that the statements made therein are true to the best of his knowledge, information, and belief.

Malcolm F. Halliday, Acting General Counsel.

Subscribed and sworn to before me this 21st day of August 1943.

John E. Lawyer, Notary Public, District of Columbia. My Commission Expires August 31, 1944.
(Seal.)

[fol. 351] August 23, 1943, notification to the petitioner, together with copy of answer of respondent and request for enforcement, transmitted, by mail, to The Wallace Corporation, Richwood, W. Va.

August 25, 1943, affidavit of service of copies of Board's answer and request for enforcement and certificate of record on counsel for the petitioner is filed.

August 30, 1943, statement under section 3 of rule 10 is filed.

September 13, 1943, affidavit of service of copies of Board's answer to petition for review in No. 5163 on counsel for the petitioners is filed.

October 14, 1943, application of petitioner for permission to file brief in excess of 100 pages filed.

Same day, order granting special permission to petitioner to file a brief in excess of fifty printed pages but not exceeding one hundred and twenty-five printed pages is filed.

October 18, 1943, brief and supplement on behalf of the petitioner are filed.

October 23, 1943, appendix to brief of respondent is filed.

October 25, 1943, affidavit of service of appendix to respondent's brief on counsel for the petitioner is filed.

November 4, 1943, stipulation as to the time for the filing of respondent's brief is filed.

November 5, 1943, brief on behalf of respondent is filed.

November 8, 1943, affidavit of service of copies of Board's brief on counsel for petitioner in No. 5135 and petitioner in No. 5163 is filed.

November 10, 1943, reply brief on behalf of petitioner is filed.

[fol. 352] November 11, 1943, the appearance of Ivar Peterson, Assistant General Counsel, National Labor Relations Board, is entered for the respondents.

Argument of Cause

November 11, 1943, (November term, 1943) cause came on to be heard, together with No. 5163, before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

[fol. 353] OPINION—Filed February 3, 1944

No. 5135

UNITED STATES CIRCUIT COURT OF APPEALS FOURTH CIRCUIT

THE WALLACE CORPORATION, Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD, LOCAL NO. 129, UNITED CONSTRUCTION WORKERS' ORGANIZING COMMITTEE, AND RICHWOOD CLOTHESPIN & DISHWORKERS UNION, Respondents.

No. 5163

RICHWOOD CLOTHESPIN & DISH WORKERS' UNION, Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD, Respondent

On Petitions for Review of an Order of the National Labor Relations Board

[fol. 354] (Argued November 11, 1943. Decided February 3, 1944.)

Before Parker, Soper and Dobie, Circuit Judges.

R. Walston Chubb (Brooks B. Callaghan; Wolverton & Callaghan; Charles S. Glazer; and Lewis, Rice, Tucker, Allen & Chubb on brief) for Petitioner in No. 5135; M. E. Bojarsky for Petitioner in No. 5163, and Ivar Peterson, Assistant General Counsel, National Labor Relations Board, (Robert B. Watts, General Counsel; Howard Lichtenstein, Assistant General Counsel; Joseph B. Robison and Marcel Mallet-Prevost, Attorneys, National Labor Relations Board, on brief) for Respondents.

PARKER, Circuit Judge:

These are petitions by the Wallace Corporation, a company operating a woodworking plant at Richwood, W. Va., and an independent union of its employees to review and set aside an order of the National Labor Relations Board. The Board found that the company had violated section 8(2) of the National Labor Relations Act by dominating,

interfering with, aid and supporting the independent union, had violated section 8(3) by discriminatorily discharging 43 employees, and in these respects and otherwise had violated section 8(1) by interfering with, restraining and coercing its employees in the exercise of rights guaranteed by section 7. The order requires the company (a) to cease [fol. 356] and desist from the unfair labor practices found; (b) to withdraw recognition from, completely disestablish, and cease giving effect to any agreement with the Independent; (c) to offer reinstatement with back pay to the 43 employees who were discriminatorily discharged; and (d) to post appropriate notices.

There is evidence in support of the Board's order to the effect that in July 1941 a local union of the C. I. O. instituted a campaign for the purpose of organizing the company's employees and that officials and supervisory employees of the company made anti-union statements in discouragement of the campaign with threats that the president of the company would never recognize the union and that, if the employees did organize, he would shut the plant down and move it away. Early in September, the union claimed a majority of the employees and demanded recognition as bargaining representative. The plant manager refused to accept the application cards for union membership unless he were allowed to personally question each of the applicants individually and suggested that an election be held. The union refused to agree to an election unless an employee who had been prominent in organizational activities and who had been discharged were restored to his position. The company refused to accede to this condition and a strike was called which became effective on September 25th.

Following the calling of the strike, the independent union was organized. There is evidence from which it may be properly inferred that a foreman and employees who acted from time to time as assistant foremen had a part in its organization, and that the anti-union attitude of the company coupled with a back-to-work movement which the company sponsored was an important factor therein. [fol. 356] The C. I. O. union filed a charge of company domination with the Board following the organization of the independent; and this complaint was pending in January 1942 when an agreement was entered into between all

parties by the terms of which the charge of domination was withdrawn, it was agreed that an election be held to choose between the C. I. O. and the Independent as bargaining representative and the company agreed to enter into a "union shop" agreement with the winner in the election. An election was held on January 30th and the Independent received 98 votes and the C. I. O. union 83, although a total of 207 employees was eligible to vote. The Independent was thereupon certified by the Board as the bargaining representative of the employees.

Following its certification, the Independent demanded that the company execute a closed shop agreement with it and clearly indicated to the company that one of the purposes of such agreement was to get rid of employees who were unacceptable because of prior union activities. In a letter of February 28th to the company the agent of the Independent said:

"The 'closed shop' will, therefore, give us some control in preventing the hiring of additional employees who are unfavorable to our interests and who would further jeopardize our majority. It would also provide us with a legal means of disposing of any present employees, including Harvey Dodrill whom our members have declared by unanimous ballot that they will not work with, whose presence in the plant is unfavorable to our interests because those who are so unfavorable will not be permitted to become members of our organization and without such membership they would not be permitted to work in the plant under a closed shop contract which we respectfully insist that we MUST have."

[fol. 357] The company opposed signing a closed shop contract with the Independent, and its attorney strongly advised against such action, but notwithstanding his advice and notwithstanding the notice contained in the letter above quoted of the intention of Independent to use the closed shop agreement to discriminate against employees and cause their discharge because of prior union activities, the company signed the contract. Pursuant to the contract, it discharged 43 of the former employees who had taken part in the effort to organize the C. I. O. union because they had not become members of the Independent, although it knew that 31 of these employees had applied for membership in the Independent and had been rejected. Sub-

sequent letters on the part of the company to the Independent, suggesting that these employees be accepted as members, show that the company understood that they had been rejected by the Independent because of the labor strife which had preceded the election. After the discharge of these employees additional charges were filed against the company, and the Board entered the order which we are asked to review.

In the absence of the consent election and the certification of Independent as a bargaining agent by the Board, there could be no question as to the correctness of the Board's order. The evidence as to anti-union statements by the company's supervisory employees, the assistance that these necessarily gave in the organization of the Independent and the participation of employees having supervisory powers in its organization is analyzed in the Board's order and need not be repeated here. It amply sustains the Board's findings. *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469; id. 4 Cir. 132 F. 2d 390; *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 80-81; *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 518-[fol. 358] 521; *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 598-599; *N. L. R. B.* v. *Norfolk Shipbuilding and Dry Dock Corp.*, 4 Cir. 109 F. 2d 128, 129; *N. L. R. B.* v. *Wallace Mfg. Co.*, 4 Cir. 95 F. 2d 818.

We do not think that the consent election and certification of the Independent as bargaining agent for the Board precluded consideration by the Board of matters occurring prior thereto for two reasons: (1) because the discharge of the employees under the circumstances here appearing was properly found by the Board to be an unfair labor practice, notwithstanding the closed shop agreement, and, upon this finding, it was proper for the Board to consider the entire history of the controversy leading up to the discharges and enter an order that would afford appropriate relief, and (2) because the power of the Board in relieving against unfair labor practices is not limited by agreements between employers and employees made with its approval or by administrative orders that it has entered, and while it might amount to an abuse of discretion to ignore these under some circumstances, the Board was justified in ignoring them here because of the oppressive and high handed conduct of the parties, which was clearly

violative of the spirit of the agreement under which the election was held, whether constituting an unfair labor practice within the meaning of the statute or not.

As to the first proposition, it is of course true that closed shop contracts are authorized by the act; and ordinarily unfair labor practice cannot be predicated on the discharge of an employee because he is not a member of the union holding a closed shop contract with the employer. Sec. 8(3) of the act 29 U. S. C. A. 158(3). This provision of the [fol. 359] act must be construed, however, in the light of the general purpose of the statute, which was to provide representation for all employees by an agent chosen by the majority and was never intended to authorize the majority to discriminate against a minority because of prior union or anti-union activities. This does not mean that either the courts or the Board are given any control over the membership of a union holding a closed shop contract. It means merely that such a contract does not excuse a discharge when membership in the union to the knowledge of the company is denied on the ground of activity in prior labor disputes. As was well said by the Board in its decision in this case:

"An employer may not enter into a closed-shop contract which to his knowledge is designed to operate as an instrument for effecting discrimination against his employees solely because of their prior union activities. The proviso in section 8(3) of the Act permits an employer to enter into an agreement with the duly designated representative of his employees, requiring membership in that organization as a condition of employment. It is true that under the terms of the election agreement the respondent was bound to execute a union-shop contract with the victorious union. It by no means follows, however, that the respondent was also bound by the election agreement to acquiesce in a scheme to penalize employees whose choice of representatives was not that of the majority; nor can the proviso in section 8(3) be thought to countenance such a result."

See also matter of *Rutland Court Owners, Inc.* 44 N. L. R. B. 587, 46 N. L. R. B. 1040; *Matter of Monsieur Henri Wines, Ltd.* 44 N. L. R. B. 1310.

It is to be noted that the agreement under which the election was held provided that the company should enter

[fol. 360] into a "union shop" contract with the union successful in the election. A "union shop" contract meant that the employees of the company would be required to become the members of the successful union as a condition of retaining their employment, not that the successful union might have discharged from employment those who had been on the opposite side of the dispute even though they were willing to become members by the simple device of denying them membership. When the letter of the Independent disclosed to the company that it was intended to use the closed shop contract to bring about the discharge of employees on account of prior labor activities, the company should have refused to sign a contract without making adequate provision for the protection of their rights. It was bound to bargain with the independent union as the duly certified bargaining agent, but it was not bound to enter into a contract which it was notified would be used for an improper purpose. It had agreed to negotiate a union shop contract; but it had not agreed to enter into such a contract as might be used to do an injustice to employees; and, in view of the letter it had received, it should have seen that provisions were inserted in the contract that would have protected their rights. It would not be fair to the company to say that it conspired with the independent union to bring about the discharge of troublesome members of the opposite union. It is fair to say, however, that it entered into the closed shop contract knowing that the Independent intended to do precisely that, and that it discharged employees who had sought and been denied membership in the Independent, when it knew that they were denied membership because of prior union activities. The Board, we think, was justified in finding that this was an unfair labor practice and upon [fol. 361] such finding was justified in considering in connection therewith the unfair labor practices which had occurred prior to the agreement and election. *Canyon Corp.* v. *N. L. R. B.*, 8 Cir. 128 F. 2d 953, 955; *Sperry Gyroscope Co.* v. *N. L. R. B.*, 2 Cir. 129 F. 2d 922, 931; *N. L. R. B.* v. *Hawk & Buck Co.*, 5 Cir. 120 F. 2d 903.

And, even if discharges such as those here involved be not considered of themselves unfair labor practices within the meaning of the act, we think that the Board was justified under the circumstances, notwithstanding the agree-

ment that had been made and the certification of the Independent, in going fully into the question of company domination and holding the Independent to be a company dominated union and hence not entitled to invoke the closed shop provision. *Cf. N. L. R. B. v. Electric Vacuum Cleaner Co.*, 315 U. S. 685, 694. The Board's power to prevent unfair labor practices is not limited by agreements that may have been made. 29 U. S. C. A. 160. And administrative orders, such as those involved in the designation of bargaining agents, furnish no occasion for the application of the principle of res adjudicata and do not bar further action by the Board. *N. L. R. B. v. Baltimore Transit Co.*, 4 Cir. — F. 2d —. Settlements approved by the Board should ordinarily be observed and administrative orders should not be lightly disregarded; (*Cf. Matter of Simplicity Pattern Co.*, 16 N. L. R. B. 291); but these are guides for the exercise of discretion by the Board, not limitations upon its power. It is the duty of the Board to prevent unfair labor practices; and the fact that it may have certified a union as a bargaining representative does not limit its power later to declare such union to be company dominated and order its disestablishment, if such [fol. 362] course is seen to be proper in the light of subsequent developments. The high-handed conduct of the Independent union here, in violation of the clear spirit of the compromise agreement as well as of the rights of the minority, and the acquiescence of the company in that conduct, furnished ample justification for the Board to inquire fully into the history of the union and determine whether it was a fit bargaining agency within the meaning of the act.

The provision as to back pay appears rather hard upon the company in view of the protests made by it to the independent union with respect to the discharges; but this was a matter for the Board and not for us. The case must be viewed in the light of the rights of the discharged employees as well as of the company; and when they have suffered injustice and hardship as the result of unfair labor practices in which the company has participated, it is for the Board and not us to say what action is appropriate to remove the effect of these practices. And the thought occurs that, if the company had not interfered with the organization of its employees in the first instance, or had protected the rights of the minority when put on

notice that the Independent intended to use the closed shop contract to do them an injustice, it would not have been placed in position to suffer from the effects of an order relating to unfair practices.

The order of the Board will be enforced.

Order Enforced.

[fol. 363] DECREE—Filed and Entered February 3, 1944

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5135

THE WALLACE CORPORATION, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, LOCAL NO. 129, UNITED CONSTRUCTION WORKERS' ORGANIZING COMMITTEE, and Richwood Clothespin & Dishworkers Union, Respondents

On Petition for Review of an Order of the National Labor Relations Board

This Cause came on to be heard upon the petition of The Wallace Corporation for review of a certain order issued against it by the National Labor Relations Board on the 7th day of June, 1943, in a proceeding before said Board numbered C-2321, entitled "In the Matter of The Wallace Corporation and B. E. Thompson and Local Union No. 129, United Construction Workers Organizing Committee"; upon the answer of said Board and request for enforcement, and upon the transcript of record in said proceeding certified and filed in this Court; and the said cause was argued by counsel.

On Consideration Whereof, it is ordered, adjudged, and decreed by the United States Circuit Court of Appeals for the Fourth Circuit, that said order of the National Labor Relations Board in said proceeding be, and the same is hereby, enforced, and that the said The Wallace Corporation abide by and perform the directions of the Board in said order contained.

John J. Parker, Senior Circuit Judge. Morris A. [fol. 364] Soper, U. S. Circuit Judge. Armistead M. Dobie, U. S. Circuit Judge.

[fol. 1116] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 5135

THE WALLACE CORPORATION

vs.

NATIONAL LABOR RELATIONS BOARD, LOCAL NO. 129, UNITED CONSTRUCTION WORKERS' ORGANIZING COMMITTEE and Richwood Clothespin & Dish Workers Union

PETITION FOR REHEARING

(Presented February 28, 1944)

To the Honorable Judges of the United States Circuit Court of Appeals, Fourth Circuit:

Comes now the Petitioner and respectfully moves and prays the Court to withdraw and set aside the Opinion and Enforcement Order heretofore rendered and entered herein, enforcing the Order of the Respondent National Labor Relations Board, and to grant Petitioner a rehearing of this cause; and to stay the issuance of the mandate, and as grounds for this petition the Petitioner states that in rendering and entering said Opinion and Enforcement Order the Court has overlooked questions and matters decisive to the case and duly submitted by counsel more particularly as follows:

1. The Court has overlooked the importance of the contract aspects of the case. The Petitioner and the two unions, as the Court is aware, entered into a strike settlement agreement dated January 13, 1942, which under the rules of the Board required the later withdrawal of the very charges of domination of which the Court now finds the [fol. 1117] Petitioner guilty. The said charges of domination were, in fact, formally withdrawn in the agreement of January 19, 1942.

Petitioner cannot assume that the Court intended to hold that this settlement agreement was illegal or void or that it was "a mere scrap of paper." This settlement agreement was the agreemnt which required the union shop contract and which led to the discharge here. The Court has re-

ferred to the acquiescence of the Compan in the high-handed conduct of the Independent without recognizing that any such alleged "acquiescence" was the result of the Company observing and carrying out its legal and binding contractual obligation.

The impression of the Petitioner that the Court has overlooked the contract aspects of the case is supported by the statement contained in the Opinion of the Court that:

> "In the absence of the consent-election and the certification of the Independent as bargaining agent by the Board, there could be no question as to the correctness of the Board's order"

Petitioner submits that while the certification was an important element in the case, the controlling element was the contract obligation of the Petitioner undertaken in an effort to settle a bitter controversy.

Regardless of the sins of the parties or of the Board, the Court should not here recede from the time-honored doctrine that contracts are to be observed. It would appear that the Court, in suggesting that the Petitioner should have followed a different course, has, in effect, recommended breach of a contract obligation, without any more justification for such breach than that the enforcement of the contract by one of the contracting parties would have a harsh result.

It is submitted that, however these difficult controversies between labor and management may eventually be resolved, [fol. 1118] it cannot be helpful, but, on the contrary, only intensify the conflict, for the courts to countenance breach of contract obligations of the kind here involved, especially where they are entered into for the purpose of settling industrial strife.

2. The Court, in holding "the Company should have refused to sign a contract without making adequate provision for the protection of their (the discharged employees) rights," overlooked the fact that if Petitioner had so refused, it would have breached its obligation under the Settlement Agreement of January 13, 1942; and, further, had the Petitioner provided in the contract who should be admitted to membership in the Independent it would have been guilty of an unfair labor practice.

3. The Court overlooked the fact that under established rules of law the contract of March 5, 1942, is valid and is not rendered illegal by reason of Petitioner's knowledge that the Independent intended to use the contract for what is now held to be an improper purpose.

4. The Court, in finding that the discharge of the employees was properly found by the Board to be an unfair labor practice, overlooked the fact that the Petitioner had nothing whatsoever to do with the denial of membership in the Independent to the discharged employees who made application for membership therein. There is no evidence in the record that the Company was aware of the reasons for exclusion, except general hostility between the unions.

5. The Court, in ordering the enforcement of the Board's order, overlooked or failed to take into consideration the fact that only thirty-one out of the forty-three employees referred to in the Board's order made application for membership in the Independent, thus excluding themselves by their own inaction.

[fol. 1119] For the reasons above assigned, Petitioner respectfully moves the Court to reconsider and rehear this cause, and during the pendency of this petition to stay the issuance of the mandate herein.

Respectfully submitted, R. Walston Chubb, 208 North Broadway, St. Louis, Missouri, Brooks B. Callaghan, Richwood, West Virginia, Solicitors for Petitioner.

Wolverton & Callaghan, Lewis, Rice, Tucker, Allen & Chubb, Charles S. Glazer, of Counsel.

R. Walston Chubb, solicitor for Petitioner herein, hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay.

R. Walston Chubb, Solicitor for Petitioner.

[fol. 1120] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE PENDING PETITION FOR REHEARING —Filed March 1, 1944

Upon the application of the Petitioners, by their counsel and for good cause shown,

It is ordered that the mandates of this Court in the above entitled cases be, and the same are hereby, stayed pending the action of the Court upon the said petition of the Petitioners for a rehearing Feb. 29, 1944.

John J. Parker, Senior Circuit Judge.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING REHEARING—Filed and Entered March 13, 1944

This court having at its January term, 1944, rendered its decision enforcing the order of the said National Labor Relations Board in this cause, and the petitioner having on February 28, 1944, presented to the Court a petition for a rehearing of the said cause, and the same having been carefully considered,

It is now here ordered by this court that the rehearing asked for be, and the same is hereby, denied. Let mandate issue after the expiration of five days from this date.

John J. Parker Senior Circuit Judge.

March 13, 1944.

March 17, 1944, petition of petitioner for stay of mandate pending application for a writ of certiorari is filed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE PENDING APPLICATION FOR A WRIT OF CERTIORARI—Filed and Entered March 17, 1944

Upon the application of the Petitioner The Wallace Corporation, by its counsel, and for good cause shown,

It is ordered that the mandates of this Court in the above entitled causes be, and the same are hereby, stayed pending [fol. 1121] the application of the said Petitioner in the Su-

preme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided said application is filed in the said Supreme Court within 30 days from this date.

John J. Parker, Senior Circuit Judge.

March 17, 1944.

[fol. 1122] In United States Cipcuit Court of Appeals

Order Further Staying Mandate—Filed April 6, 1944

Upon the application of the Richwood Clothespin & Dish Workers' Union, Petitioner in No. 5163, by its counsel, and for good cause shown,

It is ordered that the mandates of this Court in the above entitled cases be, and the same are hereby, further stayed pending the applications of the Petitioners in the Supreme Court of the United States for writs of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided said applications are filed in the said Supreme Court within 20 days from this date.

John J. Parker, Senior Circuit Judge.

April 5th, 1944.

* * * * * * *

[fol. 1123] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 1124-1125] Stipulation as to Record Omitted in Printing

[fol. 1126] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5163

RICHWOOD CLOTHESPIN & DISH WORKERS' UNION, Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD, Respondent

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

September 2, 1943, petition for review of an order of the National Labor Relations Board is filed and the cause is docketed.

Note: The petition for review is in the words and figures following, to wit:

[fol. 1127] IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5163

RICHWOOD CLOTHESPIN & DISH WORKERS' UNION, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

PETITION OF RICHWOOD CLOTHESPIN & DISH WORKERS' UNION TO REVIEW AND SET ASIDE A DECISION AND FINAL ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable the Judges of the United States Circuit Court of Appeals, Fourth Circuit:

Now comes your petitioner, Richwood Clothespin and Dish Workers' Union and respectfully shows to the Court:

[fol. 1128] I

Nature of the Proceedings as to which Review Is Sought

The proceedings as to which review is sought is an unfair labor practice complaint issued on June 25, 1942, by the National Labor Relations Board (Case C-2321), against The Wallace Corporation (hereinafter referred

to as Employer) and one B. E. Thompson upon a second amended charge filed by Local Union No. 129, United Construction Workers Organizing Committee (hereinafter referred to as Union). The complaint, as amended, alleged violations of Section 8 (1), (2) and (3) and Section 2 (6) and (7) of the National Labor Relations Act (29 U. S. C. A., Chapter 7) in that, in substance, the Employer had interfered with and discouraged its employees in its plant situate at Richwood, West Virginia, with respect to membership and activities in the Union and that said Employer had sponsored the formation of and dominated Petitioner and encouraged membership therein, and contributed to its support; and that on or about March 18, 1942, Employer, purporting to act pursuant to an alleged agreement between itself and Petitioner discharged and thereafter refused to reinstate forty-three named employees because of their membership in the Union and because of their non-membership in Petitioner; that said contract, if it existed, was illegal and void since it was made with a labor organization assisted by unfair labor practices and not the representative of the employees pursuant to Section 9 (*a*) of the Act.

Petitioner filed a petition to intervene, which was granted in so far as its interests were affected by the proceeding. Petitioner, as well as the Employer and said B. E. Thomp- [fol. 1129] son, filed separate answers to the complaint in each of which the charges were denied, and likewise each moved to dismiss the proceeding.

Petitioner in its answer alleged that it is a labor union within the meaning of Section 2, Sub-division (5) of the National Labor Relations Act; that it has been chosen by a majority of the employees of The Wallace Corporation at its plant at Richwood, West Virginia, as their exclusive bargaining agency pursuant to an election conducted by agents of the National Labor Relations Board and that as such agency it has entered into a working agreement with the Employer relative to hours of labor, rates of pay and other working conditions of said employees; and that all of the employees of said Employer at said plant are members of Petitioner.

Petitioner's answer alleged, in part, the following:

"That the said Local Union No. 129, United Construction Workers Organizing Committee heretofore filed an-

other unfair labor practice charge against the said Wallace Corporation, but that said charge was later withdrawn and a consent election held under the direction of the National Labor Relations Board for the purpose of enabling the nonsupervisory employees of The Wallace Corporation at Richwood, West Virginia, to determine by secret ballot their exclusive collective bargaining agency, if any they desired; that pursuant to agreement between The Wallace Corporation, the employer, Local Union No. 129, United Construction Workers Division of District 50, United Mine Workers of America, and the Richwood Clothespin and Dish Workers Union, a corporation, an independent employees' union composed of nonsupervisory employees of The Wallace Corporation, of Richwood, West [fol. 1130] Virginia, with the consent and approval of Philip G. Phillips, Regional Director for the National Labor Relations Board, Ninth Region, the said Richwood Clothespin and Dish Workers Union aforesaid was thereby recognized as a labor union within the meaning of the National Labor Relations Act and placed upon the ballot to be used at said consent election, together with that of the Local Union No. 129 aforesaid; that at the election so held the said employees chose as their exclusive collective bargaining agency the said Richwood Clothespin and Dish Workers Union; that the result of said election was properly certified to the National Labor Relations Board as provided by law; and such organization was thereafter officially declared and recognized as the exclusive bargaining agency of the employees aforesaid, and acting under authority conferred by the National Labor Relations Act, said Richwood Clothespin and Dish Workers Union entered into a working agreement with The Wallace Corporation concerning wages, hours of labor and conditions of employment, which said contract is now in full force and effect; that pursuant to authority conferred by the said National Labor Relations Act a union shop provision was included in said working agreement; that the persons named in Paragraph 11 of the complaint aforesaid and alleged to have been discharged by The Wallace Corporation because they were members of the United and because they were not members of the Independent, were, in fact, discharged by virtue of said union shop provision as a result of their not being members of the said Richwood Clothespin and Dish Work-

ers Union; that one of the provisions of the agreement whereby the said election was held related to a union shop provision and that the said Local Union No. 129 refused to agree to such consent election unless it was stipulated that [fol. 1131] in the event that the said Local Union No. 129 should be chosen as the exclusive bargaining agency for said employees, that a union shop provision would be inserted in the working agreement requiring all employees of the said Wallace Corporation to be members in good standing of said Local No. 129; that having withdrawn the original unfair labor practice charges and having admitted the legality of the Richwood Clothespin and Dish Workers Union as a labor union and having insisted upon a union shop provision prior to the election aforesaid, the said Local No. 129 and the National Labor Relations Board are now estopped from questioning the validity of said election, the validity of the Richwood Clothespin and Dish Workers Union or the contract made by it with The Wallace Corporation pursuant to its selection as bargaining agency by The Wallace Corporation employees in the election aforesaid."

Petitioner's answer likewise averred in substance that its certification as the exclusive collective bargaining agency aforesaid was made pursuant to the provisions of the National Labor Relations Act and rules and regulations adopted and promulgated by the National Labor Relations Board and that no objections were filed by any party to the election or agent's report therein within the five-day period provided for in said Act and "that the requirements of said Rule cannot be avoided or set aside, particularly after the execution of a working agreement by the employees chosen at such election by now permitting the filing of an unfair labor practice charge based upon acts alleged to have been committed prior to the holding of said election."

In Petitioner's answer it was averred further that the charge upon which the complaint "is based was not made in [fol. 1132] good faith" but that its purpose was "to cause the said Wallace Corporation to require its Employees, in violation of the National Labor Relations Act, to join said Local and to compel the said employer to recognize it as the exclusive collective bargaining agency of said Employees, regardless of their desires" and "regardless

of the fact that a large majority of said Employees had designated" this petitioner as such; and that by reason of acts of lawlessness and violence specifically set forth in said answer and alleged to have been committed by the Union's officers, agents and members, the Union could not be recognized as a labor union within the meaning of said Act, competent to function as such bargaining agency, and because thereof no valid complaint could be issued by the Board upon charges filed by said Local.

Upon these pleadings, a hearing was held by a Trial Examiner of the Board, at which Petitioner appear and participated. During the hearing, the Trial Examiner, pursuant to a motion by counsel for the Board, struck from Petitioner's answer the allegations relating to the acts of lawlessness and violence of the Union's officers, agents and members, hereinbefore mentioned, by reason whereof it was alleged that the Union was incompetent to act as bargaining agent for said Employees and that no valid complaint could be issued by the Board upon the Union's charges. This ruling, the Board affirmed in its Decision and Order of which complaint is now being made.

Under date of September 2, 1942, said Trial Examiner issued his Intermediate Report, wherein he recommended the disestablishment of Petitioner as the bargaining representative of employees of The Wallace Corporation and the reinstatement of the forty-three employees [fol. 1133] found by him to have been discriminated against. The Trial Examiner recommended dismissal of the complaint against Thompson, which the Board followed. Both Petitioner and The Wallace Corporation filed exceptions to such Intermediate Report; each argued orally before the Board in Washington, D. C., on November 17, 1942; and on February 27, 1943, the Board issued its Decision and Order which on May 1, 1943, it vacated and set aside and directed reargument. The Employer, the Union and Petitioner were represented by counsel and participated in the reargument, and under date of June 7, 1943, the Board again issued its Decision and Order wherein, among other things, it found that the Employer had dominated and interfered with the formation and administration of, and contributed support to, Petitioner; that said contract between Petitioner and the Employer, dated March 7, 1942, "falls outside the proviso to Section 8 (3) of the Act" and ordered the rein-

statement of said forty-three employees to their former or substantially equivalent positions and ordered the disestablishment of Petitioner as a representative of any of the employees of said Employer for the purpose of dealing with said Employer concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment. It dismissed the complaint as to Thompson.

Copies of the Board's Decision and Order, dated February 27, 1943, and that of June 7, 1943, respectively, are contained in a "Petition For Review of Order of the National Labor Relations Board" prepared and, as Petitioner is informed, filed in your Honorable Court by Employer (Case No. 5135), and Petitioner prays and requests that it be permitted to refer your Honors thereto, without copying said Decisions and Orders herein but desires that such ref- [fol. 1134] erence be tantamount to an inclusion thereof in this petition, as if the same were copied herein.

The Facts and Statutes upon Which Venue Is Based

Your Petitioner is aggrieved by said Decision and Order of June 7, 1943, wherein said Board denied to your Petitioner its right to act as a collective bargaining agency for employees of said Employer, though selected as such by a majority of said employees and though heretofore certified as such by said Board, directs its disestablishment as such an agency, and nullifies the collective bargaining agreement between the Employer and Petitioner. The basis of the relief sought by the complaint, as amended, was the alleged unfair labor practices charged against said company, alleged to have occurred in Richwood, Nicholas County, West Virginia, where said Employer maintains and operates a plant for the manufacture of clothespins and wood and paper dishes and food trays, and where Petitioner, a corporation, organized and existing under the laws of the State of West Virginia, has its residence and principal office and conducts its activities; and under the authority of Sections 9 (*d*) and 10 (*f*) of the National Labor Relations Act, 29 USCA, Sections 159 (*d*) and 160 (*f*), the United States Circuit Court of Appeals (Fourth Circuit) has jurisdiction of the parties and subject matter herein involved, as well as to grant the relief prayed for in this petition.

Relief Prayed

Petitioner prays that this Honorable Court will proceed to review the decision and final order of the National Labor [fol. 1135] Relations Board of June 7, 1943, and reverse and set aside the same in so far as said decision and order in any wise affect the right of, restrict or prevent your petitioner from acting as a collective bargaining agency or representative for the employees of The Wallace Corporation at its Richwood, West Virginia plant; that it may reverse and set aside the finding of said Board that said Employer has dominated and interfered with the formation and administration of, and contributed support to, petitioner and interefered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act; that it may reverse and set aside the order of said Board which requires said Company to withhold from petitioner all recognition as representative of any of its employees for purposes of collective bargaining, to disestablish completely Petitioner as such representative, and which requires said Employer to cease giving effect to its contract, dated March 7, 1942, with Petitioner and to offer reinstatement to the forty-three employees who were not members of Petitioner; that said Board be restrained from enforcing its order of June 7, 1943, until the final determination of this case by this Court; and that your petitioner may have all such other and further relief, both general and special, and that such orders and decrees may be had herein, as to the Court shall seem meet and proper.

Your Petitioner having been advised that said Board has heretofore (in Case No. 5135, now pending before this Honorable Court) filed a certified transcript of the entire record in the proceedings hereinbefore mentioned, prays that this Honorable Court may order that said transcript and record of said proceedings heretofore filed in said Case No. 5135 be used for purposes of review, as prayed for in this petition.

[fol. 1136] Points on Which Petitioner Intends to Rely

I

The decision and order of the Board of June 7, 1943 are unsupported by substantial evidence and are contrary to law.

There is no substantial evidence upon which the Board's findings of fact and conclusions are based, and the Board erred as a matter of law in so finding, that

(*a*) The Wallace Corporation dominated and interfered with the formation and administration of, and contributed support to, Richwood Clothespin and Dish Workers' Union.

(*b*) Petitioner is incapable of serving the employees of The Wallace Corporation as a genuine collective bargaining agency, or that the continued recognition thereof would be obstructive of the free exercise by said employees of the rights guaranteed to them by the National Labor Relations Act.

(*c*) Lundy Groves, Carm Reese and Ancil Smith are supervisory employees, and that the Employer is chargeable with their conduct.

(*d*) A meeting of the employees of The Wallace Corporation was scheduled to be held at the home of Clark Gibson, a foreman, on October 2 and that Gibson met the employees on a street corner and adjourned the meeting to the home of Mrs. Lundy Groves.

(*e*) Mrs. Lundy Groves invited Weese to attend the meeting of the employees for the purpose of assisting in the formation of a labor organization.

(*f*) Clark Gibson, foreman, associated himself with the group of employees who participated in the forma- [fol. 1137] tion of Richwood Clothespin and Dish Workers' Union, and to divert attention from himself Gibson delegated the task of providing a meeting place for those interested in organizing a labor organization limited to employees of The Wallace Corporation to his assistant, Lundy Groves, and his wife.

(*g*) Richwood Clothespin and Dish Workers' Union lent itself to The Wallace Corporation as an aid in the back-to-work movement in opposition to the Union.

(*h*) By discharging the forty-three employees because of their membership in, and activities on behalf of, the Union, and because they did not belong to the

Petitioner, the Employer discriminated with respect to their hire and tenure of employment and conditions of employment and thereby encouraged membership in Petitioner and discouraged membership in the Union.

III

The Board erred in its finding and conclusion that the contract entered into beween The Wallace Corporation and the Petitioner, dated March 7, 1942, falls outside the proviso to Section 8(3) of the National Labor Relations Act.

IV

There is no substantial evidence in the record to support the Board's findings and conclusions that

(*a*) The contract of March 7, 1942, and the contractual relationship existing thereunder have been [fol. 113] the means whereby the Employer has utilized an Employer-dominated labor organization to frustrate self-organization and to defeat genuine collective bargaining by its employees.

(*b*) Any continuation, renewal or modification of the existing contract would perpetuate the conditions which have deprived employees of the rights guaranteed to them by the Act.

(*c*) The facts make it apparent that the Employer was put on notice that the real purpose of the contract of March 7, 1942, was to bar from future employment with said Employer persons who had adhered to the Union in the election campaign.

(*d*) The contract of March 7, 1942, is "a discriminatory device to insure perpetuation of the Independent (Petitioner) and thus deprive employees of their statutory right to select bargaining representatives."

V

It was error for the Board to consider events preceding the settlement agreements of January 13, 1942, and the Board should not have affirmed the Trial Examiner's refusal to strike all testimony of the Board's witnesses relating to matters antedating such agreements.

VI

The Board is estopped, as a matter of law,

(*a*) From vitiating and nullifying its certification of Petitioner as exclusive collective bargaining agency and

[fol. 1139] (*b*) From validating the contract of March 7, 1942;

and such action by the Board is contrary to law.

VII

The Board is unwarranted in characterizing Thompson's letter of February 28, 1942, to the Employer as "an unlawful scheme", and it erred, as a matter of law, in holding that the Employer has a right to abrogate the tripartite agreement and was under an obligation to do so.

VIII

The Board erred in its "Conclusions of Law" that

(*a*) By dominating and interfering with the formation and administration of Petitioner, and by contributing support to it, the Employer engaged in unfair labor practices within the meaning of Section 8 (2) of the Act.

(*b*) By discriminating in regard to the hire and tenure of forty three employees and thereby encouraging membership in Petitioner and discouraging membership in the Union, the Employer engaged in unfair labor practices within the meaning of Section 8 (2) of the Act.

(*c*) The Employer engaged in unfair labor practices within the meaning of Section 8 (1) of the Act, as to affect the rights of Petitioner.

IX

The Board erred as a matter of law

(*a*) By ordering that the Employer shall cease and desist from,

(1) Recognizing Petitioner as a representative of [fol. 1140] any of its employees for the purposes of collective bargaining.

(2) Giving effect to its contract dated March 7, 1942, with Petitioner, or to any extension, renewal or modification thereof, or to any other contract or agreement between Employer and Petitioner which may now be in force.

(*b*) By requiring the Employer to withdraw all recognition from, and completely disestablish Petitioner as a representative of any of its employees for the purpose of dealing with Employer concerning conditions of employment and requiring reinstatement of the forty-three employees.

X

The Board erred in affirming the rulings of the Trial Examiner whereby the latter denied motions by Petitioner

(*a*) To dismiss the complaint at the opening of the hearing.

(*b*) To dismiss the complaint because of failure of proof, made at the close of the Board's case.

(*c*) To dismiss and to strike the testimony of the Board's witnesses, made at the close of the hearing.

(*d*) The Board erred in affirming the Trial Examiner's ruling in striking portions of Petitioner's answer.

Respectfully submitted, Richwood Clothespin & Dishworkers' Union, Petitioner.

M. E. Boiarsky, Charleston, West Virginia, Counsel for Petitioner.

[fol. 1141] *Duly sworn to by George Tyree. Jurat omitted in printing.*

[fol. 1142] Same day, to wit, September 2, 1943, notification to respondent, together with copy of petition for review, transmitted, by mail, to Robert B. Watts, General Counsel, National Labor Relations Board, Washington, D. C.

September 8, 1943, the appearance of M. E. Boiarsky is entered for the petitioner.

Same day, the appearance of Robert B. Watts, General Counsel, and Howard Lichtenstein, Assistant General Counsel, National Labor Relations Board, is entered for the respondent.

[fol. 1143] IN UNITED STATES CIRCUIT COURT OF APPEALS

ANSWER OF THE NATIONAL LABOR RELATIONS BOARD TO PETITION OF RICHWOOD CLOTHESPIN & DISHWORKERS' UNION—Filed September 10, 1943

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Fourth Circuit:

Comes now the National Labor Relations Board, herein called the Board, and pursuant to the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151 *et seq.*), files this answer to the petition of Richwood Clothespin & Dishworkers' Union to review and set aside the Board's Order of June 7, 1943, issued against The Wallace Corporation, Richwood, West Virginia.

1. Answering the allegations contained in said petition to review, the Board prays reference to the certified transcript of the record, filed herein, of the proceedings heretofore had herein, for a full and exact statement of the pleadings, evidence, findings of fact, conclusions of law, and order of the Board, and all other proceedings had in this matter. Further answering said petition, the Board denies each and every allegation of error contained therein.

2. Further answering, the Board avers that the proceedings had before it, the findings of fact, conclusions of law, and order of the Board, were and are in all respects valid and proper.

[fol. 1144] Wherefore, having answered each and every material allegation contained in said petition to review, the Board respectfully prays this Honorable Court that the transcript and record of the proceedings in Case No. 5135 be used as the transcript and record in the present case, that the cases be consolidated for purposes of briefing and argument, and that said petition be denied insofar as it

prays that the Order of the Board be set aside and that petitioner shall have other and further relief.

National Labor Relations Board, by (S.) Howard Lichtenstein, Assistant General Counsel.

Dated at Washington, D. C., this 9th day of September, 1943.

[fol. 1145] *Duly sworn to by Howard Lichtenstein. Jurat omitted in printing.*

[fol. 1146] September 13, 1943, affidavit of service of copy of Board's answer to petition for review on counsel for petitioner is filed.

Same day, statement under section 3 of rule 10 is filed.

October 19, 1943, brief and appendix on behalf of the petitioner are filed.

October 23, 1943, appendix to brief of respondent is filed.

November 4, 1943, stipulation as to the time for the filing of respondent's brief is filed.

November 5, 1943, brief on behalf of respondent is filed.

November 8, 1943, affidavit of service of copies of Board's brief on counsel for petitioner in No. 5135 and petitioner in No. 5163 is filed.

November 11, 1943, the appearance of Ivar Peterson, Assistant General Counsel, National Labor Relations Board, is entered for the respondent.

Argument of Cause

November 11, 1943, (November term, 1943) cause came on to be heard, together with No. 5135, before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

[fol. 1147] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5163

RICHWOOD CLOTHESPIN & DISH WORKERS' UNION, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent.

On Petition for Review of an Order of the National Labor Relations Board

DECREE—Filed and Entered February 3, 1944

This cause came on to be heard upon the petition of the Richwood Clothespin & Dish Workers' Union for review of a certain order issued against it by the National Labor Relations Board on the 7th day of June, 1943, in a proceeding before said Board numbered C-2321, entitled "In the Matter of The Wallace Corporation and B. E. Thompson and Local Union No. 129, United Construction Workers Organizing Committee", upon the answer of said Board, and upon the transcript of record in said proceeding certified and filed in this Court; and the said cause was argued by counsel.

On consideration whereof, it is ordered, adjudged, and decreed by the United States Circuit Court of Appeals for the Fourth Circuit, that said order of the National Labor Relations Board in said proceeding be, and the same is hereby, enforced, and that the said Richwood Clothespin & Dish Workers' Union abide by and perform the directions of the Board in said order contained.

John J. Parker, Senior Circuit Judge; Morris A. Soper, U. S. Circuit Judge; Armistead M. Dobie, U. S. Circuit Judge.

[fol. 1148] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE PENDING PETITION FOR REHEARING—Filed March 1, 1944

Upon the application of the Petitioners, by their counsel, and for good cause shown,

It is ordered that the mandates of this Court in the above entitled cases be, and the same are hereby, stayed

pending the action of the Court upon the said petition of the Petitioners for a rehearing.

John J. Parker, Senior Circuit Judge.

Feby. 29, 1944.

[fol. 1149] IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5163

RICHWOOD CLOTHESPIN & DISH WORKERS' UNION, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

On Petition to Review and Set Aside a Decision and Final Order of the National Labor Relations Board

PETITION FOR REHEARING

(Presented March 4, 1944)

To the Honorable Judges of the United States Circuit Court of Appeals for the Fourth Circuit:

Petitioner, Richwood Clothespin & Dish Workers' Union, respectfully represents that it is aggrieved by Your Honors' decision rendered in the above styled proceeding (consolidated with Case No. 5135, styled *The Wallace Corporation v. National Labor Relations Board, et al.*) on February 3, 1944, on which date an opinion was filed and an order consonant therewith entered and in which decision and opinion [fol. 1150] and carried into such order, petitioner conceives there is manifest error. Petitioner respectfully moves and prays that a rehearing and reargument may be granted to it by the Court; that said decision and opinion and order may be set aside, that the Court during the pendency of this petition will stay the issuance of the mandate herein, and that petitioner may have such other and further relief as may be consonant with the prayer of its original petition for appeal herein and as may be requisite and proper; and as grounds of complaint against said decision and opinion and against the order by which effectuation of the decision was provided, petitioner submits the following:

A. The Court erred in failing to hold valid the contract of March 7, 1942.

First: The Court in its opinion, admitting that, "ordinarily unfair labor practice cannot be predicated on the charge of an employee because he is not a member of the union holding a closed shop contract with the employer," then inconsistently and erroneously asserts that the Wagner Act was never intended to authorize the majority to discriminate against a minority because of prior union or anti-union activities.

Second: The Court, in its opinion and through the medium of the juristic process, has attached to the words "union shop" agreement a meaning totally foreign to the general understanding of that term, in a record wherein there is neither factual foundation nor contention that the signatories to the agreement ever intended to accord it the meaning which the Court has given to it. Likewise, such interpretation is without legal justification.

[fol. 1151] Third: There is clear inconsistency between (1) the Court's assertion that "under the Act neither the Court nor the Board is given any control over the membership of a union holding a closed shop agreement" and (2) the burden which the Court, in its opinion, imposes upon an employer having already committed himself by solemn contract to enter into a union shop agreement, to insert in such agreement provisions protective of the rights of a minority.

Fourth: The Court has overlooked the legal significance which attached to the employer's agreement of January 13, 1942, to "recognize a union shop" as well as the fact that the employer then had no knowledge of any proposal that either labor organiaztion would exclude an employee from membership.

Fifth: The Court failed in its opinion to discuss the significance of the fact that Congress had not, in the Wagner Act, made provisions to compel unions to accept members while certain state legislatures had in their labor relations acts done so where closed shop agreements were involved.

B. The court erred in holding that the Board was justified in considering the evidence occurring prior to the execution of the settlement agreement of January 13, 1942.

First: The Court in its opinion transcended the limits of the policy which the Board itself has established.

Second: The opinion of the Court is at variance with one of its prior decisions.

C. The Court erred in approving the decision of the [fol. 1152] Board that the employer had dominated, interfered with and supported petitioner.

First: The Court recognized and gave credence to the theory that employer dominated petitioner when such theory is without substantial evidence to support it.

Second: The Court has not in its opinion set forth or discussed specifically the acts occurring prior to January 13, 1942, upon which the Board predicated its conclusion of employer interference; the Court's failure in its opinion to discuss specifically the legal status of employees Reese, Smith and Groves results in a denial to them of their right of collective bargaining as ordinary employees which, as the record shows, they are during the greater part of their employment time.

Third: There is no evidence showing that Reese, Smith and Groves acted for the employer in their organizational activities rather than for themselves.

Respectfully submitted this 3d day of March, 1944.
Richwood Clothespin & Dish Workers' Union,
Petitioner.

M. E. Boiarsky, Charleston, West Virginia, Counsel for Petitioner.

Duly sworn to by M. E. Boiarsky. Jurat omitted in printing.

[fol. 1153] In United States Circuit Court of Appeals.

Order Denying Rehearing—Filed and Entered March 13, 1944

This Court having at its January term, 1944, rendered its decision enforcing the order of the said National Labor Relations Board in this cause, and the petitioner having on March 4, 1944, presented to the Court a petition for a re-

hearing of the said cause, and the same having been carefully considered,

It Is Now Here Ordered By This Court that the rehearing asked for be, and the same is hereby, denied. Let mandate issue after the expiration of five days from this date.

John J. Parker, Senior Circuit Judge.

March 13, 1944.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE PENDING APPLICATION FOR A WRIT OF CERTIORARI—Filed and Entered March 17, 1944

Upon the Application of the Petitioner The Wallace Corporation, by its counsel, and for good cause shown,

It Is Ordered that the mandates of this Court in the above entitled causes be, and the same are hereby, stayed pending the application of the said Petitioner in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided said application is filed in the said Supreme Court within 30 days from this date.

John J. Parker, Senior Circuit Judge.

March 17, 1944.

April 4, 1944, application of petitioner for a further stay of the mandate is filed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER FURTHER STAYING MANDATE—Filed April 6, 1944

Upon the Application of the Richwood Clothespin & Dish [fol. 1154] Workers' Union, Petitioner in No. 5163, by its counsel, and for good cause shown,

It Is Ordered that the mandates of this Court in the above entitled cases be, and the same are hereby, further stayed pending the applications of the Petitioners in the Supreme Court of the United States for writs of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided said applications are filed in the said Supreme Court within 20 days from this date.

John J. Parker, Senior Circuit Judge.

April 5th, 1944.

[fol. 1155] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 1156-1158] Stipulation as to Record Omitted in Printing

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[fol. 1159] Supreme Court of the United States, October Term, 1944

No. 66

Order Allowing Certiorari—Filed May 29, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 1160] Supreme Court of the United States, October Term, 1944

No. 67

Order Allowing Certiorari—Filed May 29, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 1161] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1944

No. 66. No. 67

STIPULATION AS TO THE PRINTED RECORD—Filed August 23, 1944

It has heretofore been stipulated between the parties that in the event the petitions for writs of certiorari in the above matters were granted, the printed record should consist of the proceedings in the court below and such portion of the entire transcript of the record as certified by the Board to the court below as the respective parties might designate.

Pursuant to the above stipulations and subject to the approval of the court

It is hereby stipulated and agreed that the printed transcript of the record shall consist of the following:

1. The decision and order of the National Labor Relations Board dated June 7, 1943, with appendix and concurring opinion of Harry A. Millis (appearing at pages S-1 to S-33 inclusive of transcript heretofore printed).

2. Amended complaint of the National Labor Relations Board in the Matter of The Wallace Corporation and B. E. [fol. 1162] Thompson and Local 129 U. C. W. O. C., dated June 25, 1942 (appearing at pages S-34 to S-40 inclusive of transcript heretofore printed).

3. Notice of hearing by the Regional Director of the National Labor Relations Board, dated June 25, 1942 (appearing at pages S-41 to S-42 of transcript heretofore printed).

4. Second amended charge of Local 129 U. C. W. O. C., dated June 24, 1942, sworn to before the Board (appearing at pages S-42 to S-44 of the transcript heretofore printed).

5. Answer of The Wallace Corporation, verified June 22, 1942. This Answer should be prefixed with the note: "For exhibits A, B, D, E and F of this answer, see Petitioner's exhibits 1, 2, 3, 4 and 5 post." (The answer in question appears at pages S-45 to S-55 of the transcript heretofore

6. Motion to dismiss of Respondent The Wallace Corporation. This motion should be prefaced with the note: "For exhibits A, B, D, E and F hereof, see Petitioner's exhibits 1, 2, 3, 4 and 5 post." (This motion appears at pages S-56 to S-62 of the transcript heretofore printed.)

7. Petitioner The Wallace Corporation's exhibits 1 to 5 inclusive, consisting of:

Pet. Exhibit 1. Agreement of January 19, 1942, between The Wallace Corporation and U. C. W. O. C. (appearing at pages S-63 to S-64). (Note for Clerk: Last line of exhibit as printed appears to have dropped the words: "Director, National Labor Relations Board." Please check with the original exhibit in the file.)

Pet. Exhibit 2. Agreement of January 13, 1942, between The Wallace Corporation and both unions (appearing at pages S-65 to S-67 of transcript heretofore printed).

Pet. Exhibit 3. Agreement for consent election dated January 19, 1942. (Appearing at pages S-68 to S-72 of the transcript heretofore printed.)

[fol. 1163] Pet. Exhibit 4. Report on consent election dated February 4, 1942 (appearing at pages S-73 to S-74 of the transcript heretofore printed).

Pet. Exhibit 5. Contract of agreement dated March 7, 1942, between The Wallace Corporation and Richwood Clothespin and Dish Workers Union (appearing at pages S-75 to S-81 of the transcript heretofore printed).

8. The following portions of the typewritten transcript of the record before the National Labor Relations Board:

Page 1 of the typewritten transcript showing style of the case, opening of the hearing and appearances.

Page	Line	to and including	Page	Line
1	1		1	25
47	12		47	19
56	7		57	21
62	17		64	4
66	1		67	19
68	22		71	25
William D. Griffie (Board witness).				
72	2		72	2
74	20		74	25

Page	Line	to and including	Page	Line
William D. Griffie (cont'd.):				
76	10		77	24
78	5		78	17
78	22		80	10
81	22		84	6
84	18		86	17
87	8		88	5
88	14		88	18
89	2		90	11
92	6		92	21
[fol. 1164]				
Cross examination by Mr. Chubb:				
109	2		109	2
113	19		116	20
119	19		120	22
124	7		125	16
138	8		139	16
144	5		145	15
152	12		154	20
Mrs. Mable Hinkle (Board Witness):				
168	19		168	19
168	23		168	25
169	10		169	21
170	6		170	16
171	3		171	24
172	12		172	22
173	1		176	24
177	1		179	9
180	3		180	15
188	2		190	8
191	12		191	23
Hezzie Shaver (Board Witness):				
193	3		193	3
193	11		193	18
206	12		207	22
Frances Logar (Board Witness):				
Direct examination by Mr. Shroyer:				
236	6		236	6
236	10		236	20
236	21		239	7
239	10		240	8
254	11		256	13
[fol. 1165]				
B. E. Thompson (Board Witness):				
257	1		257	1
257	8		258	14
259	24		263	20
264	12		265	2
272	17		273	20
273	24		286	6
289	13		291	22
296	8		297	9

	Page	Line	to and including	Page	Line
Cross examination by Mr. Ritchie:					
	298	21		298	25
	299	6		301	3
	302	20		303	24
Mrs. Roxie Dodrill (Board Witness).					
	309	20		309	20
	310	2		312	2
	312	7		313	10
	313	16		313	23
	315	18		316	24
	318	15		318	18
	321	19		322	22
Orville Smith (Board Witness).					
	334	15		334	15
	334	19		335	19
	340	7		341	18
	345	20		346	8
	347	6		347	18
Mrs. Minnie Givens (Board Witness).					
	351	7		351	7
	351	11		351	21
	352	2		353	3
	353	9		353	17
[fol. 1166]					
	354	9		354	9
	362	4		362	12
	365	11		365	19
	366	1		366	11
J. E. Bashaw (Board Witness).					
	368	1		368	1
	368	9		368	19
	370	17		372	16
	372	19		374	6
	376	7		380	8
	385	2		387	4
Mrs. Pearl Stewart (Board Witness).					
	387	20		387	20
	388	1		388	3
	388	6		388	15
	390	17		391	14
	391	17		392	7
	392	23		393	17
	394	8		395	21
	400	17		400	21
	401	9		402	9
	402	11		402	19
	403	12		404	10
	404	13		404	18
	416	1		417	11

Page	Line	to and including	Page	Line
William Wilson (Board Witness).				
418	1		418	1
418	5		418	13
418	23		419	5
419	9		422	11
[fol. 1167]				
Cross examination by Mr. Chubb:				
423	19		423	10
428	23		431	19
434	5		436	22
437	23		438	23
Harvey Dodrill (Board Witness).				
Direct examination by Mr. Shroyer:				
444	9		444	9
444	13		444	13
445	2		446	24
447	23		448	20
449	8		450	8
450	13		454	2
451	15		456	7
460	6		463	1
463	10		465	18
Cross examination by Mr. Chubb:				
467	14		467	14
469	12		471	20
473	8		478	24
489	23		489	24
490	2		490	11
490	14		494	11
492	6		502	17
493	9		493	1
494	19		497	1
498	12		501	7
501	18	end with words "getting along"	504	15
504	20		506	16
531	11		531	17
534	15		537	10
548	18		548	21
[fol. 1168]				
Alva Sleeth (Company Witness):				
573	5		573	5
573	9		573	26
585	6		586	21
588	4		588	21
590	21		590	21
592	16		594	19
Harry White (Company Witness).				
596	6		596	6
596	11		596	19
597	2		597	3

Page	Line	to and including	Page	Line
Harry White (Company Witness) (cont'd.).				
597	10		597	16
599	7		601	17
602	9		602	13
602	15		603	16
604	23		605	8
607	17		610	6
613	3		617	20
618	1		619	15
620	10		622	25
624	5		626	22
627	24		628	16
629	1		629	19
640	2		640	2
641	15		643	16
644	9		646	23
649	8		650	24
654	3		655	14
Pauline Green (Company Witness).				
664	20		664	20
665	1		672	13
(fol. 1169)				
A. F. Davis (Company Witness).				
675	2		675	2
675	6		675	23
676	17		677	9
678	14		678	20
679	8		681	25
683	10		684	6
685	8		691	16
702	3		709	16
711	24		712	13
712	16		714	23
715	9		715	17
716	21		717	7
717	11		719	2
720	17		724	13
724	21		725	5
725	11		725	19
726	24		727	8
728	8		729	1
730	2		733	25
736	21		737	6
737	25		738	3
738	5		738	20
738	23		739	7
758	21		761	23
762	1		764	19

Page	Line	to and including	Page	Line
Cross examination by Mr. Shroyer:				
766	21		766	21
799	21		800	6
800	17		801	14
807	19		808	25
By Mr. Ritchie:				
814	23		817	15
[fol. 1170]				
Irene Weese Groves (Company Witness)				
833	8		833	8
833	13		849	12
870	23		872	18
873	8		873	22
896	3		897	11
Wm. T. Christmas (Company Witness)				
897	17		898	17
899	19		901	4
902	3		903	18
905	5		906	16
907	1		909	25
910	15		912	4
913	14		915	20
916	11		923	26
924	11		929	26
930	9		935	18
938	1		938	17
939	11		941	12
946	22		948	6
951	15		956	18
957	1		957	1
958	19		963	24
Mahlon B. Wallace, Jr. (Company Witness)				
965	10		982	18
986	23		987	21
Cross examination by Mr. Ritchie:				
989	14		991	10
992	17		994	1
1002	25		1005	12
[fol. 1171]				
A. F. Davis (Company Witness) recalled.				
1008	4		1009	23
Wm. T. Christmas (Company Witness) recalled.				
1014	15		1015	21
1019	2		1019	18
1020	10		1020	14

9. The following additional exhibits introduced in evidence before the Trial Examiner of the National Labor Relations Board:

Petitioner Wallace Corporation's Exhibit 6 (appearing at page S-82 of the transcript heretofore printed).

Petitioner Wallace Corporation's Exhibit 7 (appearing at page S-83 of the transcript heretofore printed).

Petitioner Wallace Corporation's Exhibit 8 (appearing at page S-84 of the transcript heretofore printed).

Petitioner Wallace Corporation's Exhibit 9 (appearing at page S-87 of the transcript heretofore printed).

Petitioner Wallace Corporation's Exhibit 11 (appearing at page S-89 of the transcript heretofore printed).

Petitioner Wallace Corporation's Exhibit 12 (appearing at page S-90 of the transcript heretofore printed).

Petitioner Wallace Corporation's Exhibit 14 (appearing at page S-91 of the transcript heretofore printed).

Petitioner Wallace Corporation's Exhibit 16 (appearing at page S-92 of the transcript heretofore printed).

Petitioner Wallace Corporation's Exhibit 17 (appearing at page S-93 of the transcript heretofore printed).

Petitioner Wallace Corporation's Exhibit 18 (appearing at page S-96 of the transcript heretofore printed).

Petitioner Wallace Corporation's Exhibit 19 (appearing at page S-97 of the transcript heretofore printed).

[fol. 1172] Petitioner Wallace Corporation's Exhibit 20 (appearing at page S-97 of the transcript heretofore printed).

Petitioner Wallace Corporation's Exhibit 21 (appearing at page S-98 of the transcript heretofore printed).

Petitioner Wallace Corporation's Exhibit 22 (appearing at page S-99 of the transcript heretofore printed).

Petitioner Wallace Corporation's Exhibit 23 (appearing at page S-103 of the transcript heretofore printed).

Petitioner Wallace Corporation's Exhibit 24 (appearing at page S-105 of the transcript heretofore printed).

Petitioner Wallace Corporation's Exhibit (appearing at page S-107 of the transcript heretofore printed).

Petitioner Wallace Corporation's Exhibit 26 (appearing at page S-109 of the transcript heretofore printed).

Petitioner Wallace Corporation's Exhibit 27 (appearing at page S-110 of the transcript heretofore printed).

Petitioner Wallace Corporation's Exhibit 29 (appearing at pages S-113 and S-114 of the transcript heretofore printed).

10. The following additional exhibits introduced in evidence before the Trial Examiner by the National Labor Relations Board:

Board's Exhibit 2 (appearing at pages S-115 of the transcript heretofore printed).

Board's Exhibit 4 (appearing at page 322 of the transcript heretofore printed).

Board's Exhibit 5 (appearing at page S-116 of the transcript heretofore printed).

11. Answer of Richwood Clothespin & Dishworkers Union verified July 3, 1942 (appearing at pages 363 to 374, inclusive, of the transcript heretofore printed).

12. Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit, consisting of the following:

[fol. 1173] Entry of filing and petition of The Wallace Corporation for review, as it appears in transcript heretofore printed at pages 323 to 337.

The Clerk is authorized to make notations with respect to Exhibits A and B of the said petition for review, as follows (Exhibit A). "Memorandum of Clerk: This exhibit is a copy of the decision and order of the National Labor Relations Board dated February 27, 1943, superseded by later decision upon rehearing, dated June 7, 1943, and is omitted by agreement of the parties." (Exhibit B). "Memorandum of Clerk: This exhibit is a copy of the decision and order of the National Labor Relations Board dated June 7, 1943. It is set out in full at the beginning of this transcript of the record and is therefore omitted here."

Clerk's notation of entries as they appear in folio 343 of the official transcript.

Answer of the National Labor Relations Board filed August 23, 1943, as certified at folio 344 to folio 350 inclusive.

Minute entries appearing at folio 351 to folio 352 inclusive.

Opinion of the court filed February 3, 1944, decree and order of February 3, 1944, of the United States Circuit Court of Appeals for the Fourth Circuit, folios 353 to 364 inclusive.

Petition for rehearing by The Wallace Corporation. (This petition appears at page 352 of the transcript heretofore printed.)

Orders and entries and stipulation as to the record, as the same appears at folios 369 to 374 inclusive of the record.

Entry of filing and petition of Richwood Clothespin & Dishworkers Union to review, appearing in transcript heretofore printed at pages 395 to 410, inclusive, being folio 395 through folio 396, inclusive.

Minute entries appearing at folio 397.

[fol. 1174] Answer of the National Labor Relations Board as certified at folios 398 to 400, inclusive.

Minute entries and decree appearing at folios 401 to 403, inclusive.

Petition for rehearing filed by Richwood Clothespin & Dishworkers Union (appearing at pages 415 to 418, inclusive, of the transcript heretofore printed).

Orders and entries and stipulation as to the record as the same appears at folios 404, 406 to 411, inclusive.

It is further stipulated and agreed that the printed record so prepared shall constitute the printed record in each of the above-entitled proceedings.

It is further stipulated and agreed, subject to the approval of the court, that the parties may in their printed briefs, refer to portions of the typewritten transcript and exhibits not included in the printed record.

Lyle M. Allen, Solicitor for The Wallace Corporation. Charles Fahy, Solicitor general of the United States. Charles S. Rhyne, Solicitor for Richwood Clothespin and Dishworkers Union.

[fol. 1175] [File endorsement omitted.]

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

THE WALLACE CORPORATION,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.

No. [redacted] 66

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals,
Fourth Circuit,

and

BRIEF IN SUPPORT THEREOF.

LYLE M. ALLEN,
Attorney for Petitioner.

R. WALSTON CHUBB,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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(A) The court below has erred as a matter of law in holding that the making of a closed or union shop contract with a certified union is invalid under the closed shop proviso of Section 8 (3) of the National Labor Relations Act, and therefore constitutes an unfair labor practice,	

had advance knowledge of hostility between such certified majority union and a rival union, and was warned of probable exclusions of employees from membership on that account, it being admitted that the employer had previously agreed to grant such closed or union shop contract to either union according to the Board's certification 22

(B) The Court erred in failing to hold the Board to accepted standards of fair dealing in the following respects: (a) in approving a complaint of the Board which was filed in violation of a settlement agreement approved by the Board; (b) in permitting the Board to vacate and set aside its own certification of a union as bargaining agent after an election held pursuant to a strike settlement, without evidence of unfair practices affecting such settlement or election; and, (c) in nullifying a contract entered into by an employer in reliance upon such certification by the Board 30

(C) The Court erred in failing to scrutinize and weigh the evidence upon which the Board repudiated a settlement previously approved by it and a certification by the Board, and in upholding such repudiation on the presumption that the findings of the Board were valid if supported by substantial evidence, even though the Board was passing upon the validity of its own acts 34

Conclusion 38

Cases Cited.

Corn Products Refining Co. and United Cannery Workers of America (1940), 22 NLRB 824 32

Hamer v. Nashawena Mills (1943), 52 N. E. (2d) 22 26

Hope Webbing Co. and Textile Workers Organizing Comm., 14 NLRB 55 32

Houghton v. Payne, 194 U. S. 88, 48 Law. Ed. 888 33

Magnolia Petroleum Co. v. NLRB, 115 Fed. (2d) 1007 33

Matter of Godchaux Sugar, Inc., 12 NLRB 568 32

Medo Photo Supply Corp. v. NLRB (U. S. Supreme Court, No. 265, April 10, 1944) 29

National Labor Relations Board v. Electric Vacuum Cleaner Co. et al. (1942), 315 U. S. 685, 86 Law. Ed. 1120 28

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NLRB v. Sun Shipbuilding and Dry Dock Co. (C. C. A. 3rd, 1943), 135 Fed. (2d) 15 35

Shenandoah Dives Mining Co., 11 NLRB 885 32

U. S. v. Alabama G. S. R. Co., 142 U. S. 615 33

Wickwire Bros., 16 NLRB 316 32

Statutes Cited.

National Labor Relations Act, Sec. 8 (3) 23, 24

Rules of this Court, Rules 12 and 38 11

28 U. S. C., Secs. 346 and 347 ..... 11, 18

29 U. S. C., Sec. 160, Subsecs. (c) and (f) 11, 18

Textbooks Cited.

Toner, "The Closed Shop," Washington, D. C., p. 36 25

Wilcox, Triborough Case, 56 Har. Law. Rev. 584 25

Report Cited.

Senate Report on Labor Bill, S. Rep. 573, 74th Congress, First Session, p. 12 27

IN THE

SUPREME COURT OF THE UNITED STATES.

THE WALLACE CORPORATION,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.

No.....

PETITION FOR WRIT OF CERTIORARI

To the Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows as follows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case arises upon a petition filed in the Circuit Court of Appeals for the Fourth Circuit to review a decision of the National Labor Relations Board in a complaint case

instituted by the Board. The procedure for such review is provided by Section 10 (f) of the National Labor Relations Act [29 U. S. C. 160 (f)].

The petition to review was filed by your petitioner, The Wallace Corporation (hereinafter called the Company), which is a Missouri corporation operating a plant for the manufacture of clothespins, wood dishes and other wood products at Richwood, West Virginia, where the company employed about 200 people.

The complaint of the Board against the Company was filed on June 25, 1942, after almost a year of controversy. The complaint was filed by the Board upon written charges (S-42)* of Local Union 129, United Construction Workers Organizing Committee, a local of the CIO (hereinafter referred to as the CIO). This union had lost a Labor Board election held the previous January 30th, resulting in the certification by the Board on February 4, 1942, of a rival Independent union, known as the Richwood Clothespin and Dish Workers Union (hereinafter called the Independent), as exclusive bargaining agent (Pet. Ex. 4, S-73).

The complaint alleged the discriminatory discharge on March 17, 1942, of forty-three employees of the Company "because they were members of" the CIO and "because they were not members of" the Independent union (S-39); that the Company purported to act under a closed shop contract, and that the same was "illegal and void." The complaint neglected to mention the fact that said contract was made with a union certified by the Board itself. The complaint alleged many other violations of the act, including, notably, domination by the Company of said certified union. The Board filed this complaint, notwithstanding that an identical charge, dated October 9, 1941, had been previously made by the CIO and withdrawn, with Board approval, in connection with a strike settlement of January 13, 1942. The Board neglected to mention this settlement in the complaint. (For charge see Bd. Ex. 5, S-110;

*Pages 1 to 252 of Transcript of Record are prefixed by letter, "S" and are so referred to herein.

withdrawn in Pet. Ex. 1, S-63.) The Board, after hearing and rehearing, sustained the complaint in decision and order of June 7, 1943 (S-1), and the Circuit Court of Appeals refused to disturb the same in opinion dated February 3, 1944 (Record page 345). The order of the Board requires disestablishment of the Independent and reinstatement of the forty-three employees with a penalty of over two years back pay. The Court affirms this penalty.

At the outset the Company contested the propriety of the Board's complaint and moved for its dismissal (S-56). The Company claimed prior withdrawal and settlement (with Board approval) of the charges of domination of the Independent union, citing the strike settlement contract (S-65) and withdrawal agreement (S-63), and claimed that the discharge of which it was accused was required of it (as the Board well knew) under the terms of a closed shop contract (Pet. Ex. 5, S-75), which, in turn, it had been obligated to make under the terms of the strike settlement with the CIO and Independent, and under the certification of the Independent by the Board itself (S-73). The defense charged that both the CIO and the Board, by repudiating the settlement and election, and reopening the issues, were violating the elementary principles of equity and fair dealing; and, in effect, that the proceedings constituted an abuse of administrative discretion.

THE ISSUES.

The case therefore presents squarely the novel question of the finality of a consent election and ensuing certification of the union, and the effect of such certification upon the right of the union to make and enforce a closed shop. From the employer's standpoint, the question is whether, having relied on the certification, he can be penalized for making a closed shop contract and enforcing it at the union's insistence. The case also presents the question of

the effect of settlement between the parties (approved by the Board's agents) upon the Board's right to reopen the issues so settled.

On the facts the case is equally novel and calls, perhaps, more for a sociologist than for a lawyer's brief. The Board would have it appear that this is an ordinary unfair practice case. In order to impugn the Company's good faith and to show a discriminatory intention in a discharge which occurred on March 17, 1942, the Board has reopened a closed issue and produced evidence of events during the turmoil of a strike during the previous fall. The real issue is the effect of the settlement and certification. The power of the Board to make conclusive findings has become in this case a power to distort the issues and the facts.

What actually happened in this case was this: The CIO union undertook to organize a lumber town in the West Virginia hills.* Opposition formed under the leadership of B. E. Thompson, the editor of the Nicholas Republican, who considered the CIO was "radical" (R-138). The Independent union in this case was formed after the strike began. Thompson was called in as adviser and the new group was officered by an oiler in the company's mill room (R-198) and a machine tender in the lathe room (R-197), neither of them being foremen, but both being above the average in skill and pay.

The strike at the company's plant lasted some three and one-half months. There was a picket line and rifle fire (R-165). It was inevitable that such a strike should produce hostility and antagonisms. The Company found itself between two extremes during the whole period, between a militant CIO union and an opposition group led by the editor of the "Nicholas Republican."

It is significant that in the settlement of the strike the CIO insisted upon a closed shop clause. The settlement

*A simultaneous strike was going on at a large lumber mill adjacent to the petitioner's plant (R-248).

was a kind of "winner take all" proposal. The Board, which had previously investigated charges of company domination, was aware of the situation at Richwood. The settlement agreement was submitted to it, resulting in the withdrawal of the preceding charges of company assistance to the union. The Board conducted the election, and, when no objections resulted, certified the Independent.

When the settlement and election resulted in the harsh and vindictive exclusion of employees by the Independent the Board was appealed to by the CIO. The Board could not discipline or control the union under the Act. It is perhaps a "dead give away" of the Board's knowledge of the real source of the trouble that its first effort was to reach Thompson. An agent of the Board actually visited Thompson's employer, the Woodyard Publications, and sought to have him transferred or discharged by his employer (S-130 to 131), and threatened charges of unfair practice against the employer (S-127). (As stated in the Board's opinion, Thompson himself was joined in the original complaint against the petitioner, a joinder which even the Board's Examiner could not support.) The efforts of the Board to reach the union through Thompson failed and then the complaint was filed against this company.

The Company was not a free agent in this sequence of events. It was bound by the settlement to make the closed shop contract. It was bound by the Board's certification to make such a contract with the certified union, and when the certified union sought harshly to enforce the contract the Company felt it had no alternative but to observe its undertaking. It is now being penalized for that.

Neither the Board nor the Court can find any conspiracy between the Company and the Independent and admit the Company's prompt protest and effort to retain the employees. But neither the Board nor the Court have any difficulty in overlooking the strike settlement and the ear

tification and in imputing to the Company the hostility between the rival unions growing out of the strike and which resulted in the exclusion of members by the Independent.

The issues presented can best be defined by a brief narrative of the facts about the settlement, certification and contract which are here pleaded in defense.

BRIEF NARRATIVE.

On December 30, 1941, the bitter strike at the Company's plant at Richwood was proceeding into its fourth month. On that date the Company received the following telegram from the CIO representative (Pet. Ex. 6, S.82):

"Charleston, W. Va. Dec. 30

Charles Davis, General Manager,
The Wallace Corporation
Richwood, W. Va.

In the interests of national unity, for the sake of harmony and to prevent the possibility of bloodshed, if and when you attempt to open your plant, I have influenced your workers to make you a further compromise proposition, which is as follows Local Union 129, UCWOC, will agree, with the approval of the National Relations Labor Board, to enter into a consent election, with you and your company union, on the condition that when we prove a majority and become the exclusive bargaining agency for all your employees, that as a condition of employment all eligible employees must become members of Local Union 129, UCWOC. Wire answer.

George J. Titler,
Field Representative UCWOC"

The foregoing telegram became the basis of a written contract of settlement made by the Company with both the CIO and the Independent Union on the following January

13th (S-65). The telegram requires very brief comment. It evidences the bitterness and violence of the strike. It evidences the continued insistence of the CIO upon a closed or union shop and it evidences the belief of the CIO that it would prevail in an election, and also that the Independent was a "company union." There can, therefore, be no doubt that the CIO went into the settlement knowing that the settlement was intended to finally dispose of the question of company domination of the Independent.

The record abundantly proves that the Board itself knew at the time, of the outstanding charges of company domination. Indeed, formal charges of company domination had been filed with the Board in October, 1941, following the organization of the Independent (Bd. Ex. 5, S-116), and the Board had investigated these charges, and its representative advised the Company informally and in a summary manner that they were justified (Pet. Ex. 17, S-93). The Independent was a strike-born union, no doubt antagonistic to the CIO. The record shows also that the Company did not originate the closed shop feature, requested in the telegram of the CIO, but, rather, opposed the closed shop (S-234).

Following this telegram negotiations in settlement of the strike were opened, and in the early morning hours of January 13th the CIO and the Independent and the Company signed an agreement (Pet. Ex. 2, S-65) that the plant should be opened at 8 a. m. the same day; that everyone would return to work; that the Company would not influence in any way its employees for or against either union and the unions would not exercise any coercion. The Company agreed to recognize, as exclusive bargaining agent, whichever union was proved, by a vote conducted by the Board, to represent a majority of its employees and to start negotiations immediately after the result of the election was determined and to grant a union shop. The fol-

lowing clause about the union shop was contained in the settlement agreement (S-66):

> "The company further agrees that if either union is proven to represent a majority of its employees by said vote, it will recognize a union shop, providing that the company shall at all times retain the right to suspend, hire (sic) or discharge any employee for proper and just cause."

Wage adjustments were to be retroactive.

There is no suggestion anywhere in the decision of the Board or of the court below that this settlement agreement was fraudulent, void or even subject to suspicion. It is barely mentioned in the Board's decision and order or in the Court's opinion.

The parties appeared at the Board office and two agreements were drawn, dated January 19th, one "to dispose of" and for withdrawal of the charges of domination and other charges (S-63) and the other for a consent election in customary form (S-68). Both agreements were approved by the Board's Regional Director, in writing, after signature by all parties.

What followed this settlement was its performance. The election was held on January 30th. No formal objections were made, and the Board, on February 4th, certified the Independent as the exclusive bargaining representative for the employees in the plant (Pet. Ex. 4, S-73). In accordance with the settlement agreement and the certification, the Company and the Independent commenced negotiations. The Independent, which had shown no interest in the union shop agreement at the time of the settlement (S-228) (S-241), suddenly found itself beneficiary of a union shop clause and thereafter insisted upon it over the objections of the Company (S-132, S-225). Negotiations on behalf of the Independent were in the hands of Thompson, editor of the "Nicholas Republican."

The Court and the Board make much of the fact that the Company had warning of the hostility between the two unions, referring particularly to Thompson's letter to the Company of February 28, 1942 (Pet. Ex. 8, S-84). There could be nothing sinister or unusual about that, for any casual observer would have known of this hostility in view of the violent strike and close election (the vote was 98 to 83). The contract with the Independent required that all employees become members of the Independent within ten days. When the ten days were up, on March 17th, the Company was notified that forty-three employees were not members of the Independent, and they were laid off. The Company protested and made efforts to reinstate the employees (see Pet. Ex. 9, S-87). It considered itself bound by its contract, however, and complied, rather than risk charges of interference, or justify charges of breach of its contract. It was stipulated at the trial that thirty-one of the excluded employees had been refused membership by vote of the Independent and that twelve of them had not even applied for membership in the Independent (S-121). There is no evidence that the Company knew, at the time, of the reason why the forty-three employees were not members of the Independent. The Company did not know whether the discharged employees had been excluded from membership or had failed to apply for membership. There is no evidence that the Company then knew that these employees were members of the CIO.

THE FINDINGS OF THE BOARD.

It should be noted that neither the Board nor the Court makes any distinction between employees refused membership and employees who never applied for membership in the union. The discharge is laid at the door of the Company and said to be discriminatory, even where admittedly due to the neglect of the employees to apply for member-

ship in the Independent. The Company executives were in fact surprised and protested the Independent's vindictive action (S-243).

The Court in its opinion expresses sympathy for the Company, in view of its protest at the discharge of these employees, but affirms the conclusion that the closed shop contract was an unfair labor practice and not authorized by the National Labor Relations Act, because the Company was warned of the union's intention to exclude. The Court admits that neither the courts nor the Board are given any control over the membership of a union having a closed shop contract, and yet says that the employer in this case should have refused to discharge the non-member employees in question when the employer knew that the union excluded because of "activity in prior labor disputes."

The Court admits, as does the Board, that there was no conspiracy on the part of the Company and the Independent in this matter. The Court simply concludes, without further evidence than the making of a closed shop contract (with knowledge that there was intention to exclude) that the discharge by the Company of non-members of the union was a discharge on account of prior union activity and therefore discriminatory. There was exclusion of thirty-one employees by the union and the **union** may have "discriminated" against these thirty-one. But the **Company** did not do the discriminating against these thirty-one and **neither** the Company nor the union ever took action on the eleven employees who never tried to join the union.

But there is no question about the irregularity of the Board's action in this case. It is clear that the Board reasserted charges which were withdrawn, with its approval, on behalf of the union which had withdrawn them. It is clear that the Board knew of the union strike settlement and aided in its repudiation by reopening the issues

It is clear that the Board repudiated its own certification of the Independent and seeks to penalize the employer who had negotiated a contract with the certified union.

II.

JURISDICTIONAL STATEMENT.

Pursuant to paragraph 2 of Rule 38 and Rule 12 of this Court, the petitioner states that the basis upon which it is contended that this Court has jurisdiction to review the judgment or decree in question is as follows:

1. The statutes believed to sustain the jurisdiction of this Court are Title 28, U. S. C., Sec. 347, providing that in any case, civil or criminal, in a Circuit Court of Appeals it shall be competent for the Supreme Court of the United States, upon petition of any party thereto, to require by certiorari that the cause be certified to the Supreme Court for determination by it, with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal; and also Section 160 of Title 29 U. S. C., Subsection (e), which vests exclusive jurisdiction in the Circuit Courts of Appeal of the United States (except when in vacation) to enforce any final orders of the National Labor Relations Board and providing that the judgment and decrees thereof shall be final "except that the same shall be subject to review . . . by the Supreme Court of the United States by writ of certiorari or certification as provided in Sections 346 and 347 of Title 28." And subdivision (f) of said Section 160 of Title 29 providing for petitions by persons aggrieved to the said Circuit Courts of Appeal, to modify or set aside final orders of the NLRB and which provides that "the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems

just and proper and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board." The Answer of the Board to the Petition for Review prayed enforcement of the order (R. p. 341).

2. The judgment or order of the Court sought to be reviewed was entered on the 3rd day of February, 1944, and the order of the Court was that the order of the Board be enforced as appears from page 352 of the printed record. Petition for rehearing was filed with the said Circuit Court of Appeals for the Fourth Circuit on February 28, 1944 (R. p. 353), and the said petition for rehearing was overruled by said Court by order made and entered on March 13, 1944 (R. p. 357).

III.

QUESTIONS PRESENTED.

This case presents the following questions:

(A) **As to the closed shop proviso of the Act—**

(1) Where a closed shop contract is made with a union certified by the Board as exclusive bargaining agent, pursuant to a consent election, and there is no finding of assistance to the union or other infirmity in the election, is not such election and certification conclusive upon the Board and the employer as to the capacity of the union to make a closed shop contract under Section 8 (3) of the Act; or, in the alternative, may the Board, notwithstanding the foregoing, thereafter adduce evidence of facts antedating the consent agreement (and then known to the Board) for the purpose of showing that the union was previously assisted by unfair labor practices?

(2) Whether as a matter of law, a closed shop agreement may be invalidated or held to be an unfair labor practice because of the Company's knowledge of the intention of the union to exclude employees from the

union, absent any evidence of discriminatory purpose or conspiracy on the part of the Company and in the face of evidence that the Company protested both the closed shop clause and the enforcement of the clause.

(B) **As to the abuse of administrative discretion—**

(1) May the National Labor Relations Board reopen and set aside a strike settlement agreement, a valid election, and its own certification of a union, and a subsequent labor contract with that union, on the basis of facts antedating the settlement and substantially known to the Board at the time of settlement, in the absence of a showing of fraud, concealment or imposition upon the Board in the making of such settlement and certification?

(2) Is it an abuse of administrative discretion for the Board to file and prosecute the complaint of a minority union involving charges of domination of the majority union, which charges were previously withdrawn with the full knowledge and approval of the Board, pursuant to a written strike settlement made with both unions involved, and in which settlement the Board participated by approving withdrawal of the charges, and by conducting an election pursuant to the agreement, and by certifying the majority union—absent a showing of unfair labor practices subsequent to the settlement?

(C) **As to the discharge of the forty three employees—**

(1) Whether there is any evidence in this record to support the Board's finding that the Company discharged the forty-three employees mentioned in the order because of prior union activity?

(2) Is there any evidence to support the Board's finding that the disqualification and discharge of employees for nonmembership in the Independent union can be attributed to a discriminatory purpose of the Company either with

respect to thirty-one employees excluded by the union from its membership, or with respect to twelve nonmember employees who never applied for such membership in the union?

IV.

REASONS RELIED ON FOR GRANTING OF THE WRIT.

1. The decision of the Circuit Court of Appeals for the Fourth Circuit presents a question of interpretation of the proviso of Section 8 (3) of the National Labor Relations Act, which proviso expressly validates a closed or union shop contract with a certified union. The holding of the Court that an employer may not plead such a closed shop contract with a certified union as a defense to the alleged discriminatory discharge of nonmembers of the union, but must "protect" its employees by insisting upon admission of all its employees to the union, involves an important question of federal law which has not been but should be settled by this Court. The court below justifies its ruling only because it was shown that the employer had advance knowledge of hostility between the certified union and the employees belonging to a rival union, and the probability of some exclusions from membership on that account, and sets aside the certification on the ground that the contract itself was an unfair practice.

2. The decision of the Circuit Court of Appeals involves important questions of the limits of administrative discretion. The said decision approves the filing and prosecution of a complaint in which both the Board and the complaining union ignore a prior strike-settlement agreement, and in which the Board repudiates its own certification, and then invalidates and nullifies a contract made in reliance upon the same, and even penalizes the employer for such reliance. The Board and the Court sustain such

complaint only on the basis of facts antedating such settlement and well known to the Board at the time of such settlement. Furthermore, in affirming the Board's decision invalidating its own acts, the Court does not scrutinize or weigh the evidence, but adheres to the presumption that the findings are correct if supported by substantial evidence. This holding of the Court so far sanctions departure by an administrative Board from the accepted and usual course of administrative and judicial proceedings as to call for an exercise of this Court's power of supervision.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Fourth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court of Appeals, had in the case numbered and entitled on its docket No. 5135, The Wallace Corporation, Appellant, v. National Labor Relations Board, et al., Respondents, to the end that this case may be reviewed and determined by this Court as provided by the statutes of the United States, and that judgment herein of said Circuit Court of Appeals be reversed by the Court and for such further relief as to this Court may seem proper.

Dated April 20, 1940.

THE WALLACE CORPORATION,
By LYLE M. ALLEN,
Counsel for Petitioner.

R. WALSTON CHUBB,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE WALLACE CORPORATION,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.

No.....

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion in the Circuit Court of Appeals for the Fourth Circuit appears at page 345 of the record, where the opinion is copied, and is reported in 141 Fed (2d) 87.

II.

JURISDICTION.

1. The date of the judgment to be reviewed is February 3, 1944. Petition for rehearing was denied on March 13, 1944. Copy of the said order denying petition for rehearing appears at page 357 of the record.

2. The statutory provisions which are believed to sustain the jurisdiction of the court are set forth in the petition for the writ of certiorari filed herewith and are briefly as follows: 28 U. S. C., Sections 346 and 347; 29 U. S. C., Section 160 (e) and (f).

III.

STATEMENT OF THE CASE.

A general statement of the case appears in the preceding petition, which is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS.

Errors on Issues of Fact.

1. The Court erred in holding that there was substantial evidence to support the Board's finding that the Company discharged the forty-three employees mentioned in the order because of prior union activity or with discriminatory intent.

2. The Court erred in respect to the following erroneous conclusions which are unsupported by the evidence:

(a) That at the time the Company discharged the forty-three employees "it knew that thirty-one of these employees had applied for membership in the Independent and had been rejected";

(b) That the Company "acquiesced in the conduct of the Independent union" for the reason that (to the extent that such finding implies silent approval or absence of protest) there is no evidence to support such conclusion and for the further reason that such holding ignores the admitted fact that the Company was bound by the strike-settlement to make a union shop contract and bound by such union shop contract to deny employment to non-member employees;

(c) That the conduct of the Company was "oppressive and high handed" for the reason that there is no evidence to support such conclusion and for the further reason that said conclusion is inconsistent with the Court's later statement that the conduct of the Independent union was high handed and that the Company merely acquiesced in the same.

Errors of Law (Closed Shop).

3. The Court erred in holding that a closed shop or union shop contract authorized by section 8 (3) of the Act was invalidated by knowledge on the part of the employer of the intention of the union to exclude from membership employees hostile to the union (members of a rival union which had conducted a violent strike) and in holding that the Company was under a duty to disregard its union shop contract in order to "protect" such excluded employees and under a duty to insist upon their admission to the union.

4. The Court erred in holding that the closed shop proviso of the National Labor Relations Act [Section 8 (3)] validating contracts which required membership in a union as a condition of employment also requires a union holding such contract to admit all employees of the employer to membership if they apply and is not binding on the employer if the union excludes any employee on the ground of hostility of such employee to the union.

5. The Court erred in holding that the discharge of ~~eleven~~ twelve out of the forty-three employees of the Company who were non-members of the union was discriminatory, it being stipulated and conceded that said ~~eleven~~ twelve employees never applied for membership in said Independent union, for the reason that there is no evidence to support the charge of discrimination and for the further reason that even under the theory of the Court there was no

act of discrimination against said employees on the part of either the Independent or the Company.

6. The Court erred as a matter of law in holding that the closed shop proviso of the Act [Section 8 (3)] was never intended to authorize the majority (referring to the majority union) to exclude and thereby discriminate against a minority (referring to the members of the minority union) because the majority concluded the minority were hostile to the majority union—for the reason that the Act does not purport to regulate and prohibit unfair labor practices of union organizations and expressly legalizes a closed shop contract.

Errors in Respect to Administrative Discretion of the Board.

7. The Court erred in holding that it was within the administrative discretion of the Board to disregard the strike settlement agreement approved by the Board, and to disregard the certification of the Board which followed, and erred in holding that such settlements are not to be observed in all cases but should only be observed "ordinarily," and in holding that such administrative orders of the Board may be disregarded, but not "lightly."

8. The Court erred in sustaining the Board's denial of the petitioner's motions to dismiss, for the reasons (a) that it was an abuse of administrative discretion for the Board to file and prosecute a complaint involving charges of domination of an alleged company union when the same charges had been previously withdrawn, with the full knowledge of the facts and approval of the Board, pursuant to a written strike settlement of which the Board was

of the capacity of the union to make a closed shop contract, and not subject to be set aside by reason of facts antedating the consent election agreement and known to the Board.

9. The Court erred in its failure to recognize that the Board in this case was passing upon the validity of its own acts, and in such a case should not be entitled to the benefit of the presumption that its findings are valid if supported by substantial evidence, but on the contrary, all the evidence should be considered.

V.

ARGUMENT.

SUMMARY STATEMENT OF ARGUMENT.

(A) The court below has erred as a matter of law in holding that the making of a closed or union shop contract with a certified union is invalid under the closed shop proviso of Section 8 (3) of the National Labor Relations Act, and therefore constitutes an unfair labor practice, solely upon the ground that the employer had advance knowledge of hostility between such certified majority union and a rival union, and was warned of probable exclusions of employees from membership on that account it being admitted that the employer had previously agreed to grant such closed or union shop contract to either union according to the Board's certification.

(B) The Court erred in failing to hold the Board to accepted standards of fair dealing in the following respects: (a) in approving a complaint of the Board which was filed in violation of a settlement agreement approved by the Board; (b) in permitting the Board to vacate and set aside its own certification of a union as bargaining agent after an election held pursuant to a strike settlement, without evidence of unfair practices affecting such settlement or election; and, (c) in nullifying a contract entered into by an employer in reliance upon such certification by the Board.

(C) The Court erred in failing to scrutinize and weigh the evidence upon which the Board repudiated a settlement previously approved by it and a certification by the Board, and in upholding such repudiation on the presumption that the findings of the Board were valid if supported by substantial evidence, even though the Board was passing upon the validity of its own acts.

ARGUMENT.

(A) **The court below has erred as a matter of law in holding that the making of a closed or union shop contract with a certified union is invalid under the closed shop proviso of Section 8 (3) of the National Labor Relations Act and therefore constitutes an unfair labor practice, solely upon the ground that the employer had advance knowledge of hostility between such certified majority union and a rival union and was warned of probable exclusions of employees from membership on that account, it being admitted that the employer had previously agreed to grant such closed or union shop contract to either union according to the Board's certification.**

The Company had agreed to make a closed shop contract in connection with the strike settlement and considered that it was bound to perform such contract when made. As an alternative to breach of contract with a certified union, the Company chose to discharge employees who had failed to become members of the Independent union. The Independent was certified by the Board and the Board knew why the contract had been made.

The Board and the Court have nevertheless held that the making of the closed shop contract was in bad faith and constituted an unfair labor practice on the part of the Company, because the Company had warning that it would be used to exclude unnamed nonmember employees. This holding that the making of the closed shop contract was an unfair labor practice had a far-reaching effect, in that the Board thereby felt that it was justified in setting aside its prior certification, and disregarding the settlement contract, and reasserting and reinvestigating the same charges of Company domination which had been withdrawn with its approval when the settlement was made.

The theory of the Board and of the court below in holding the closed shop contract invalid is as follows: Ordinarily, unfair labor practice cannot be predicated on the discharge of an employee because he is not a member of a certified union holding a closed shop contract with the employer. Such discrimination is permitted by Section 8 (3) of the Act.* This provision of the act must be construed, however, says the court, "in the light of the general purpose of the statute" which was to provide representation for all employees by an agent chosen by the majority. The Court says that the proviso "was never intended to authorize the majority to discriminate against a minority because of prior union or anti-union activities" (meaning activities hostile to the majority, no doubt).

It will be seen that here the Court definitely takes the position that a closed shop contract is not intended to authorize the majority **union** to "discriminate" against a minority union because of prior opposition of the minority to the majority union. The Court admits that neither the courts nor the Board are given any control over the membership of a union holding a closed shop contract. The holding of the Court clearly indicates, however, that an **employer** must exercise such control if the majority becomes vindictive. The court below takes the final step in its illogical progression by transferring and imputing to the employer the discrimination exercised by the majority union and says that the Court's conclusion "means merely

*Sec. 8. It shall be an unfair labor practice for an employer

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, that nothing in this Act, or in the National Industrial Recovery Act, as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in this act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a) in the appropriate collective bargaining unit covered by such agreement when made.

that such a contract does not excuse a discharge when membership in the union to the knowledge of the company is denied on the ground of activity in prior labor disputes." There is no escape from the conclusion that under the Court's doctrine the Company's knowledge of union motives alone would give the Company the right to disregard its own contract and dictate admission to membership in the union. Is not such interference manifestly in violation of the injunction of Section 8 of the Act? Is it not "encouraging or discouraging membership in a labor organization"? The Court, however, purports to hold that the employer may so violate the Act, because the closed shop clause must be interpreted "in the spirit of the Act."

This petitioner does not propose to defend the closed shop provision of the Act. The Company was required in this situation, however, to determine its own obligations under such a contract, in the face of the union demands. Petitioner submits that, factually and historically, a closed shop contract means the right to exclude on the part of a union:

> "Discharge of unionists from positions or occupations covered by the closed shop agreement is an essential part, implied or expressed, of every such agreement." Toner, "The Closed Shop," Washington, D. C., 1942, page 36.
>
> "The result of a valid closed shop contract is to require the employer on demand by the controlling union and for its benefit to make use of just the sort of coercion which the law forbids the employer to use for his own benefit." Wilcox, Triborough case, 56 Har. Law. Rev. 584.

Discharge of members of a rival union has been approved by the courts notwithstanding they were old employees of the employer. In **NLRB v. Lion Shoe Co.** (C. C. A. 1st, 1938), 97 Fed. (2d) 448, the Court upheld a closed shop

contract with an independent union after dispute with an A. F. of L. union and clearly countenanced the discharge of nonmember employees.

The Supreme Judicial Court of Massachusetts has recently construed the closed shop clause in the case of **Hamer v. Nashawena Mills** (1943), 52 N. E. (2d) 22.* In this case the plaintiffs were employees of the mill which had, prior to 1943, been organized by an A. F. of L. union with a closed shop. When this contract with A. F. of L. terminated, an election was held and a CIO union was certified, and made a contract with the textile mills which also contained a closed shop clause. The contract gave employees thirty days in which to join. The suit was brought by employees of the mills who had been solicited to join the CIO, but who refused to join and refused to quit their jobs. (There was a saving clause in the contract that permitted employment of nonunion employees if they could not be replaced by the union.) The Court said it was fairly inferable that if a supply of labor became available the plaintiffs would be discharged. The plaintiffs sought an injunction, which was denied by the Court. The Court said the defendant union had been elected by a majority of the employees of the bargaining unit, to which the plaintiffs belonged, and that the union was acting "not merely for its own members but as the representative of all employees included in the unit." The Court held the plaintiffs had surrendered to the union their right to deal individually. The execution of a closed shop agreement by this union was permissible, the Court said, under the state and federal law and the union had the right to determine working conditions, including authority to agree upon a closed shop.

The Court pointed out that the defendant union was expressly designated by the National Labor Relations Act

*This case was cited to the court below, after submission, in a supplemental brief, but is not mentioned in the opinion.

as the exclusive bargaining representative of all such employees and said:

> "It would be strange if an employer who is required to enter into negotiations for a contract with the designated union and who, in the event that the execution of a contract results, is bound to observe its terms and provisions, would not be able to enforce the contract which settled wages, hours of labor and other working conditions because he agreed with the union to conduct a closed shop. To set aside a contract upon that basis would be contrary to the public policy of the nation. * * * There is nothing in the plaintiffs' contention that the defendant union was without power to execute a closed shop agreement."

The decision in this case is clearly contrary to the views of the court in the instant case, to the effect that the closed shop "was never intended to authorize the majority to discriminate against a minority because of prior union or antiunion activities." The case holds that the majority has a right to dictate a closed shop and thereby exclude such of the minority as fail to join the majority union. The ruling applies to at least twelve employees in our case. It indicates the validity of exclusion, by the majority, of all forty-three here involved, unless it be held that the union's motives for exclusion affect the right. (In any view, the exclusion in the instant case was not the act of the Company.)

There is also evidence in the legislative history of the Act that Congress, in adopting the closed shop proviso, intended to leave in union hands complete control of union membership, including the right to exclude. Congress was accused of throwing its influence in favor of the closed shop, at all times a controversial subject, and the Senate Committee found it necessary to disclaim such intention (Senate Report on Labor Bill, S. Rep. 573, 74th Congress, First Session; p. 12):

"The proviso attached to the third unfair labor practice deals with the question of the closed shop. Propaganda has been widespread that this proviso attaches special legal sanctions to the closed shop or seeks to impose it upon all industry. This propaganda is absolutely false. * * *

"In other words, the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal; it does not interfere with the status quo on this debatable subject but leaves the way open to such agreements as might now legally be consummated, with two exceptions about to be noted."

On the next page the Senate Committee admits the discriminatory and coercive character of the closed-shop proviso in the following words:

"Majority rule, it must be noted, does not imply that any employee can be required to join a union except through the traditional method of a closed-shop agreement made with the assent of the employer and since, **in the absence of such an agreement**, the bill specifically prevents discrimination against anyone, either for belonging or not belonging to a union, the representatives selected by the majority will be quite powerless to make agreements more favorable to the majority than to the minority." (Emphasis ours.)

Note that the Senate Committee says "in the absence of" a closed-shop agreement, discrimination is not possible by the majority.

No authority has hitherto been cited which is contrary to the position of the petitioner, except the case of **National Labor Relations Board v. Electric Vacuum Cleaner Co. et al.** (1942), 315 U. S. 685, 86 Law. Ed. 1120, holding a closed shop contract invalid if the union, prior to the making of the same, had been assisted by the company. In

that case it was not knowledge of the intention to exclude which led this Court to hold that the closed-shop contract was no defense and could not justify discharges of existing employees. On the contrary, the Court found clear evidence that prior to the execution of the closed-shop contract the employer had assisted the union holding such contract by inducing employees to join such union. No certification by the Board was involved. The case clearly implies that a closed-shop contract would justify the discharge of existing employees even though it was shown that they had been previously affiliated with a minority union.

The court below suggests that the Company in its collective bargaining "should have seen that provisions were inserted in the contract that would have protected" the rights of minority employees. The Court assumes, without warrant, that the employer made no attempt to do so. The Court assumes that the employer could have forced such concession upon the union and assumes further that the employer had a right to insist upon that interpretation of its agreement to make a closed-shop contract. The Court assumes that the employer could force the union to be reasonable.

We might admit that any closed shop would be more humane if it implied in every case a requirement of an open union as to existing employees. We do not believe that such an intention can be read into the statute which has been adopted by Congress. A closed shop implies exclusion by the union, free from employer control.

There is a suggestion in the recent decision of this Court in **Medo Photo Supply Corp. v. NLRB** (U. S. Supreme Court, No. 265, April 10, 1944), that your petitioner was correct in assuming that the Independent union had rights independent of its members and that this employer would have been guilty of interference and violation of the act if he had insisted upon jobs for non-members of the union. It appears to your petitioner, in short, that the benevo-

lent suggestions of the court below resolve themselves into a judicial sanction for breach of contract by this petitioner. Aside from other scruples, breach of contract could not be held to promote either collective bargaining or industrial peace, which is the declared purpose of the National Labor Relations Act.

(B) **The Court erred in failing to hold the Board to accepted standards of fair dealing in the following respects: (a) in approving a complaint of the Board which was filed in violation of a settlement agreement approved by the Board; (b) in permitting the Board to vacate and set aside its own certification of a union as bargaining agent after an election held pursuant to a strike settlement, without evidence of unfair practices affecting such settlement or subsequent thereto; and (c) in nullifying a contract entered into by an employer in reliance upon such certification by the Board.**

We submit that the Court has erred in approving manifest abuses of administrative discretion in this case. The specifications set forth in the above point may be somewhat enlarged as to the facts by the following recapitulation:

The Board's opinion in this case opens with a recitation of highly prejudicial testimony of interested witnesses about the events leading to the strike in September, 1941, thus seeking to justify the Board's duplicity in June, 1942. The Company is falsely placed in the position of arbitrary opposition to the CIO union and as sponsor to the group which opposed it, and which eventually won the election. The statement of facts by the Board and the Court ignores the intervening settlement, and most of the Company testimony.

On the facts, however, there can be no dispute that the Board approved and in fact required the withdrawal of charges of domination of the Independent union in con-

nection with the strike settlement, having full knowledge of the facts, and then, after participating in such settlement by holding an election, it reasserted the identical charges and reopened the controversy on identical facts when one of the unions prevailed and harshly insisted upon the terms of the settlement.

There can also be no argument that the Board followed this reassertion of charges by setting aside the settlement and reopening the controversy over the protest of the employer.

There is no dispute also that the Board led the employer in this case, by its certification, to bargain with a union and then after the employer made a contract pursuant to the certification, the Board vacated the certification and nullified the contract.

The Board states that it would not ordinarily re-examine the facts antedating a certification except upon proof of unfair practices subsequent to the certification. It finds such justification only in the making of the closed shop contract by the employer coupled with knowledge by the employer that the certified union was likely to enforce such contract, and actual harsh enforcement by the Independent union. It is notable that the Board has in its brief denied conspiracy between the Independent and the employer, and the Court likewise states in its opinion that there was no conspiracy between the employer and the union.

The conduct of the Board and its approval by the court below appears the more erroneous and unjustified because the Board and its agents and the Court alike, in appraising the good faith of the employer, overlook and ignore the fact that the employer had no choice in making the closed shop contract. It was bound to make such contract by the terms of the strike settlement regardless of which union prevailed in the election.

Authorities.

It will be observed that the petitioner does not phrase this argument in the language of res adjudicata or estoppel. The case presents, of course, a perfect example of estoppel. The certification of the union as exclusive bargaining representative had no other purpose than to induce the petitioner to act and to act as it did. The petitioner then acted in reliance upon the certification and made a contract as it was previously bound to do. Should not the Board be estopped to set aside this contract, and even more than that, to assess the penalties of back pay?

The withdrawal of charges of domination of the Independent union, in connection with the strike settlement, also bears some analogy to a dismissal with prejudice in a court. It warrants a plea of res adjudicata. Such dismissal was required by the Board as a condition precedent to the conduct of a consent election and was part of the settlement.

The National Labor Relations Board itself has in effect recognized the doctrine of estoppel by holding that "the effective administration of the Act requires that settlement agreements in which the Board's agents participate should be respected." **Wickwire Bros.**, 16 NLRB 316; **Hope Webbing Co.** and **Textile Workers Organizing Comm.**, 14 NLRB 55; **Matter of Godchaux Sugar, Inc.**, 12 NLRB 568; **Corn Products Refining Co.** and **United Cannery Workers of America** (1940), 22 NLRB 824; **Shenandoah Dives Mining Co.**, 11 NLRB 885.

In the last cited case the doctrine of the Board on the subject of compromise agreements is stated as follows, l.c. 888:

> "Although we do not agree that the compromise agreement estops the Board from proceeding herein, we believe that effective administration of the Act requires that the Board's agents have the respect and confidence of labor organizations and employers with

whom their work brings them in contact. Repudiation of agreements entered into and relied on in good faith necessarily impairs such respect and confidence. . . . The respondent apparently relied and acted upon the agreement, reinstating an employee, the legality of whose discharge had not been adjudicated. We believe the policies of the Act will best be effectuated by giving effect to the agreement and refraining from consideration of the alleged unfair labor practices. The complaint will be dismissed."

In the general field of administrative law the decisions are not particularly helpful. **Houghton v. Payne**, 194 U. S. 88, 48 Law. Ed. 888, was a case involving a certification of the "Riverside Literature Series" as second class matter and this certification was pleaded as a bar to a change in ruling by the Postmaster General. This Court quoted **U. S. v. Alabama G. S. R. Co.**, 142 U. S. 615, to the effect that the Court looked with disfavor upon any change in rulings whereby parties might be injured who had contracted with the Government on the faith of a former construction. The Court, however, approved the change in classification because there was no such injury. The case is of interest simply because it is based so clearly upon the fact that no vested rights had attached and no contract was impaired by the revocation of the certification. There are, of course, many cases to the same effect in the law affecting administrative officers.

The Tenth Circuit Court of Appeals held in **Magnolia Petroleum Co. v. NLRB**, 115 Fed. (2d) 1007 (in respect to two out of thirty-four of the company's operating districts), that where consent elections had been held by the Board and unions had been certified, such elections and certifications barred disestablishment of the unions in these two districts.

We prefer to rely in the instant case upon the doctrines which underlie the rules of estoppel and res adjudicata,

rather than on the adjudicated cases. The underlying doctrine is fair play. The CIO made a settlement proposal which was accepted, and when they lost, they refused to abide by their agreement. To use the vernacular, they "welched" on their contract. The Board supported them by bringing this complaint. The Board itself participated in the settlement and certified the union, with no other object than to induce this employer to bargain with the certified union. Furthermore, the Board knew that the petitioner was obligated by the settlement to make a closed shop contract as a result of such certification. And now the Board not only finds this conduct of the employer to constitute an unfair practice, but has assessed heavy penalties for back pay upon the employer for so carrying out its contractual obligations.

(C) **The Court erred in failing to scrutinize and weigh the evidence upon which the Board repudiated a settlement previously approved by it and a certification by the Board, and in upholding such repudiation on the presumption that the findings of the Board were valid if supported by substantial evidence, even though the Board was passing upon the validity of its own acts.**

The Court in this case accepts, as true the "findings" of the Board which, upon alleged substantial evidence, support the opening thesis, that this employer from the outset was unfair to organized labor. Petitioner respectfully submits that this is not to be tolerated, in a case where the Board has repudiated and is passing judgment upon its own acts.

There can be no doubt upon the facts of this case that in nullifying its own certification and in setting aside a settlement which it approved the Board is passing upon the validity of its own acts. The Board thus passes upon

that its findings are correct if supported by substantial evidence.

We have found no case in which any court has so applied the presumption. It is bad enough to permit an administrative Board to pass judgment upon others, where such Board is acting as complainant, prosecutor and judge. But how fraught with danger is a rule which permits any semi-judicial body under such a procedure, not only to act as judge in its own case, passing judgment on its own acts, but even arms and protects such power by a presumption in its favor, if any evidence can be found to warrant it.

The danger in indulging in such presumptions in a case of this kind was recognized by the Circuit Court of Appeals for the Third Circuit in **NLRB v. Sun Shipbuilding and Dry Dock Co.** (C. C. A. 3rd, 1943), 135 Fed. (2d) 15. This was a consent election case in which the Independent union prevailed and was certified. Charges were tardily filed and a Board complaint followed, with an order of disestablishment. The Court held there was no substantial evidence to support the Board's finding, but by way of dictum commented on the danger of repudiating certifications.

In referring to the Board's order disestablishing a union which it had itself certified, the Court said:

> "But manifestly the possibilities inherent in the exercise of such power, upon a complaint filed long after a theretofore unquestioned certification and for matters which allegedly occurred in the formation of the bargaining agent prior to the election, are so vast in their implications as to require an especially detailed scrutiny of the evidence in order that it may be determined with reasonable certainty whether the findings whereon the Board directs disestablishment

There are two circumstances in this case which indicate the danger of presumptions that the Board's findings are justified.

The first circumstance arises from the hardship of this case, namely, *the discharge of forty-three employees* and the fact that if the hardship resulted from the act of the union the Board was, under the terms of the National Labor Relations Act, without power to control such acts of the union. There is accordingly a great temptation for the Board to attempt to rectify the situation by placing the responsibility upon the employer and proceeding against the employer. We contend that this is exactly what has been done.

The second circumstance which indicates the danger of such presumption lies in the nature of central issue in this case: The good faith of the Company. The main accusation against the Company is a discriminatory intention or state of mind in discharging the employees. The offense is not the discharge; the offense is the intention or state of mind of the Company. Both the Board and the Court constantly charge the Company with discharging the employees "because of prior union activities," which of course is a matter of motivation or state of mind. The Company's defense to this charge was based upon objective facts susceptible of proof, namely, that the employees were not members of the Independent (which was admitted); that the Company had made a closed shop contract with the Independent union (which is admitted) and that the Independent union was certified by the Board (which is admitted) and that by the terms of the contract the employees were not eligible for employment (which is admitted). The good faith of the contract itself is supported by the fact that the Company was bound to make a closed shop contract at a time when it could not determine which union would have the benefit of such a contract, namely, in the strike settlement agreement.

The determination and finding of the Board that the discharge was discriminatory is therefore based upon inferences and it can hardly be disputed that such inferences are supported principally in this case by the findings of the Board as to acts antedating the strike settlement.

The Court in this case does not attempt to examine and weigh the evidence supporting the Board's findings but in stating the facts simply states that "there is evidence to support" such findings. The Court has apparently entirely excluded consideration of the fact that the company executives denied the evidence of the discharged employees as to the statements of foremen and supervisory employees in regard to the attitude of the Company. The Board and the Court have credited the testimony of these highly interested witnesses and completely disregarded the Company's testimony, notably: the fact that the Company was willing at the outset to determine representation by a Labor Board election; that the Company used every reasonable persuasion to induce the Independent to relent in its insistence upon the discharge; and the fact that the Company was bound to make the closed shop contract and bound to perform the closed shop contract.

The petitioner's request for review of this case is further supported by the manifest errors in fact which are disclosed by the Court's opinion. For example, its finding that the Company knew at the time of the discharge that thirty-one of the employees had applied for membership in the Independent and had been rejected. The Board did not so find and there is no evidence to support this statement. Furthermore, the Court refers to the Company's acquiescence in the conduct of the Independent in one place and in another refers to the "oppressive and high-handed conduct of the parties." The Court has furthermore adopted the language of the Board to the effect that the employees in question were discharged because of "prior union activity" when it is obvious from all of the facts, including

the express statement of the Independent, that the reason for exclusion was hostility of the employees to the Independent union.

Then, of course, there is the wholesale treatment of the forty-three employees. It was stipulated that twelve of these never applied for membership in the Independent union. Yet the Court bases its decision upon the fact that membership in the Independent was denied to all forty-three.

Lastly, the court below has piled inference upon inference by concluding that the motives expressed by the Independent union should be ascribed or imputed to the Company merely because the Company had knowledge of the hostility.

CONCLUSION.

We respectfully submit that this case should be reviewed by this Court. It involves a novel question regarding the closed-shop proviso of the Act, and questions of administrative procedure in the important field of labor relations. The decision of the court below has left this petitioner with the impression that the contract aspects of the case have been ignored. The decision and action of the Board and its agents have left the impression that the observance of settlements and of contracts is an anachronism having no place in the field of labor relations. Petitioner submits, on the contrary, that it will not assist in the solution of these controversial problems, for the courts to countenance, much less encourage, breach of contract.

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Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

THE WALLACE CORPORATION,
Petitioner,

vs.

No. 927.

NATIONAL LABOR RELATIONS BOARD.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Fourth Circuit.

PETITIONER'S REPLY BRIEF.

LYLE M. ALLEN,
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PETITIONER'S REPLY BRIEF.

Petitioner respectfully submits the following reply to the brief of the National Labor Relations Board filed in opposition to this application for a writ of certiorari.

UNIQUE ISSUES IN THIS CASE.

The two main issues in this case, as stated by the Board and Petitioner alike, are unique. Neither issue has been resolved by any case cited by the Board or known to your

I.

Abuse of Administrative Discretion.

The first clear injustice in this case arises from the conduct of an administrative tribunal in repudiating a strike settlement which it approved with full knowledge of the facts, and then advancing those same facts, upon reinvestigation, as a reason for repudiation of the settlement and ensuing election and certification. It is a unique feature of this case that the Board had investigated the alleged charges of company domination and had approved withdrawal of such charges in connection with a series of formal written settlement agreements.

The decision in the instant case goes further than any prior decision in nullifying an election and certification by the Board. The decision also nullifies a contract made in reliance upon such certification. Furthermore, the decision imposes penalties upon the employer in the form of back pay.

The Board cites National Labor Relations Board v. T. W. Phillips Gas & Oil Co. (C. C. A. 3rd Cir.), 141 F. (2d) 304, 5, 6, and other cases, to the effect that the Board is not estopped from a full investigation of unfair practices where such occur subsequent to a consent election and certification.

In the instant case the Board found no subsequent unfair practice except the making of a closed shop contract which the employer was previously bound to make. In the instant case the prior facts antedating the settlement and certification were fully known to the Board before the settlement.

The purpose of the certification in the instant case was to execute a settlement and determine the bargaining agent pursuant to that settlement. The Board may not be technically estopped to make the investigation. This Petitioner simply contends that the Board has violated ordinary principles of fair dealing in holding that this

Petitioner had no right to rely upon the settlement and certification of the Board when the Board was at all times advised of the facts which it later adduced and when there has been no change in the situation of the parties. The Board, for example, knew that the Petitioner was obligated to make the closed-shop contract which is now alleged as an unfair practice, and claimed by the Board as justification for reopening the settled issues. This is sharp dealing.

But, more than that, this decision goes further than any prior decision in the imposition of penalties for reliance upon the Board's certification. It goes further than any prior decision in holding that the Board may nullify a contract made with a certified union, absent intervening misconduct.

The punitive spirit of the Board's decision appears obvious when it is realized that back pay was awarded to twelve employees who never asked to join the independent union or applied for membership. Even the independent union did not exclude them, and certainly the Company cannot be held accountable for their nonmembership. The case of these twelve is clearly covered by the decision of Hamer v. Nashawena Mills (Mass. Sup. Jud. Ct.), 32 N. E. (2d) 22, which has been so lightly dismissed by the Board's brief.

NO CASE HAS BEEN CITED BY THE BOARD WHICH HAS HELD THAT AN EMPLOYER MAY BE PENALIZED FOR ACTING UPON THE CERTIFICATION OF THE BOARD.

NO CASE HAS BEEN FOUND OR CITED WHICH HOLDS THAT THE BOARD MAY NULLIFY A CONTRACT MADE IN RELIANCE UPON THE BOARD'S CERTIFICATION, ABSENT INTERVENING MISCONDUCT.

With respect to the Board's repudiation (at the behest of a C. I. O. Union) of a strike settlement (the terms of

which were dictated by that Union) there is no precedent whatever for such conduct on the part of an administrative Board. Shall it be said that the Board will approve a closed-shop contract for a majority union, after an election, provided that union is the C. I. O., but would repudiate the election if the C. I. O. lost?

The case cited by the Board (and by the Petitioner in its brief below) which comes nearest to this situation is **Warehousemen's Union v. National Labor Relations Board**, and **National Labor Relations Board v. McKesson-Robbins** (C. C. A. D. C. 1941), 121 F. (2d) 84. In that case there had been a truce agreement and the representation was to be settled by the American Federation of Labor convention. Before submission to the convention, one of the unions withdrew from the Federation and, of course, the Federation was not then a proper arbitrator under the circumstances. Furthermore, in the Warehousemen's case, there had been no certification but only an order for an election. The Court held that there was no bar to subsequent complaint and inquiry. In our case, on the other hand, the strike settlement was carried out, and there was a certification, and it was acted upon. In our case the charges had been withdrawn and furthermore the closed shop contract was required of the employer by prior agreement.

II.

The second issue in the case, as stated by both Petitioner and the Board, requires a construction of the closed shop proviso of the Act.

The Petitioner frames this issue somewhat as follows: It is patently unjust for the Board, without substantial evidence, to hold that an employer is guilty of discriminatory intent, because the employer discharged employees in compliance with a closed shop contract, **which he was bound to make**, at the insistence of a certified union **which he was bound to recognize**.

The issue of sufficiency of the evidence of actual intent is fading from the case, because the Board's brief now tacitly concedes that it was the Independent union and not the employer which "discriminated." (The Board's decision and the opinion of the Court below proceeded on a vague implication whereby hostile motives of the Independent union were imputed to the employer.)

Some comment on this point is in order: In the argument in the Circuit Court of Appeals it was admitted by the Board (and the Court below agrees) that the employer was not in conspiracy or collusion with the Independent union in this discharge. In its present brief the Board goes one step further.

The Board Now Admits the Employer Did Not Discriminate.

No less than seven times the Board states in its brief that the **Independent union** excluded the discharged employees "because of prior union activity," or words to that effect (Board Brief pp. 2, 9, 10, 15, 17, 22, and 23). Thus the Board now tacitly admits that the discriminatory intent was the intent of the Independent union and not the intent of the employer. The complaint of the Board is therefore reduced to this: That the employer had knowledge of the intention of the Independent union to exclude, and therefore should have refused to make or enforce the closed shop clause.

But, even with this admission, the Board is still inaccurate. While the employer undoubtedly knew, in view of the history of the labor dispute, that there was a divided camp, and great hostility, between the two unions, the employer did not know how far such hostility would be pushed, or how many employees would be excluded, or whether the reasons for the hostility were due to violence during the strike or other animosities arising out of the

competition between the unions. The only individual employee mentioned in the evidence, as an object of the Independent's hostility, was Harvey Dodrill, whose case had been submitted to arbitration of the Regional Director (R. 66), and he had been reinstated by the Company following the strike. The Company considered this issue settled along with the other (R. 195).

In making the seven statements that the employees were discriminated against "because of prior union activity," the Board in its brief cites evidence in only one instance, that is, on page 10 of its brief. What is this evidence?

The first reference is R. 20, 23, which is the decision of the Board. This is, of course, not evidence.

The next reference is R. 43, which is the Second Amended Charge by the C. I. O. union, which, of course, is not evidence.

The next reference is R. pp. 263, 264. This is the testimony of William D. Griffie, one of the excluded employees, to the effect that John or "Foxy" Snyder, a member of the Independent, had told him "his reason for my being voted out was because I would not—because I were president of local 129."

Thereafter Griffie testified that he applied to the Independent for membership and was rejected, and then he was asked:

> "Q. And you have no means of knowing the reason why you were rejected, do you? A. Nothing more than what he told me.
>
> Q. What? A. He was one of the members."

That evidence is not evidence of **Company** intent.

The next reference is to pages 272, 273 of the Record, which is a stipulation as to the employees discharged. This stipulation was made at the trial between the attorneys for the Independent and the Board and consented to by counsel for the Company. It recites that 43 employees

were laid off "pursuant to the terms of a working agreement" between the Independent and the corporation; that 12 did not apply for membership, and that 31 applied for membership in the Independent and "their applications were voted upon by the members of the organization in the regular manner * * * but said applications did not receive the required number of votes to permit them to become members therein."

This is all the stipulation said. There is not even an implication that the employer knew why these employees were not members. In a letter after the layoff, to the Independent, protesting the action, the Company stated it had no knowledge of the facts (R. 87).

The next citation is to R. 297, in which witness Dodrill, an officer of the C. I. O., testified at the hearing that he had checked the cards of all parties laid off, after the layoff, and that they all belonged to the C. I. O. Even the president of the C. I. O. had to check whether they were members of the C. I. O. **There is no evidence that the Company knew at the time of the layoff about prior activities or membership of these employees in the C. I. O., or that the employer was influenced by such considerations at all.**

There is, therefore, no evidence whatever that the Company laid off these employees on account of hostility to them or to their union. The evidence is that the Company wanted to retain their employees (R. 87).

There is ample evidence of hostility among the employees. There were two rival unions. They had been engaged in a three months' strike, accompanied by violence. It would be absurd to suggest that either the Company, or the Board, or the unions involved, were unaware of this hostility. The Company had made its settlement. It was interested in "burying the hatchet," and protested the action of the Independent (R. 87, 134).

The brief of the Board therefore abandons any direct charge that the employer actually had a discriminatory

intent in discharging these employees. The position is indeed not tenable, for in the case of 12 employees, there was no act of exclusion by the union; no act of discrimination which could be imputed to the employer. The fabric of implication and imputation wholly fails at this point. The Board's punitive zeal could not reach so far.

Does a Closed Shop Permit the Majority to Exclude Members of a Rival Union?

And so the question is one of law—interpretation of the closed shop proviso. Did the Independent union have a right to exclude hostile employees after a strike and election, in which the Independent was certified as exclusive bargaining agent?

This employer was faced with the necessity of determining the rights of the Independent union. It had been forced into granting a closed shop clause. It was not then called upon nor is it now called upon to defend or advocate a closed shop. The employer decided, whether he liked it or not, that it was not the province of the employer to determine for a union whom it should admit to membership. The knowledge of hostility between the unions goes without saying. The employer protested the exclusion but it could not hazard breach of contract on the novel assumption made by the Board and by the Court below that a closed shop contract does not justify a certified union in excluding from that union elements that it judges to be hostile, members of a rival union, or otherwise.

The Board suggests in its brief that exclusion of hostile minority elements would make it necessary for employers to speculate as to which union they should support. Petitioner submits that this is exactly what an employee does in determining whether or not to join any union. Every employee who opposes a union which has or may obtain a closed shop contract exposes himself to the hazard of exclusion. The closed shop is a classical policy of labor.

devised for collective protection. It implies the right to exclude individuals. It may be right or wrong. But so long as it is legalized an employer not only cannot interfere for the benefit of the minority—he cannot be held responsible for the results—he has no option.

The case, therefore, calls for a straight-out determination whether a majority union having a closed shop contract can exclude hostile employees from its union after an election and certification. There are no cases cited by the Board which deny the right. The employer concluded that the majority had that right. The plain provisions of the Act required the employer to recognize the union and not interfere with its membership. The plain provisions of the settlement agreement required that the Independent be granted a closed shop. Did the employer have any legal right or any moral obligation to do more than protest (as it did)? The Court below suggests employer interference with membership selection by the union, prohibited by the Act, or breach of contract, which is a dangerous course in any tribunal.

In framing this issue the Board emphasizes that the employer had no right to make the closed shop contract or to enforce it, which it knew that the Independent intended to refuse membership because of prior hostilities. If the union had the right to demand a closed shop contract (which it did in this case) and if under such closed shop contract it had the right to exclude anyone it deemed hostile, then what difference would it make that the employer had knowledge of the intention to enforce such rights? The record shows that the employer objected to a strict closed shop at all times perhaps for that very reason. It is submitted, further, that most of the opposition in the controversy over the closed shop has been based upon the power of exclusion which it grants to the majority—a power to exclude the individual from employment, presumably in the interest of preservation of the group.

Even if the employer was wrong (and we submit he was right), is there any justice in imposing a penalty for relying on a certification and a contract? Even if the employer was wrong (which we do not admit), is there any reason why he should pay back pay to 12 employees who never asked to join the majority union?

The Board relies vaguely upon the purpose of the Act "to insure to employees of their right of self-organization and a free choice of representatives." But in this case the employees had an election which is not attacked or impugned. Their status was certified by the Board. There was thus no occasion in this case to invoke the above-mentioned policy. But, regardless of such considerations, no amount of enthusiasm for the policy of the Act and no amount of preference for a militant C. I. O. or dislike of local independents should be held to justify repudiation of settlements, breach of contract, and indiscriminate penalties.

Respectfully submitted,

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Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

THE WALLACE CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

No. 66.

PETITIONER'S BRIEF.

LYLE M. ALLEN,
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October 10, 1944.

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III. Far from being an unfair practice, the decision of the employer to abide by its contract was correct in this case for the following reasons:

(a) The employer in making the closed shop contract in this case did no more than it was obliged to do, and the court's opinion to the contrary is in error 48

(b) The employer was supported by two well-settled principles of law, namely, that a union has exclusive control of admission to its own membership, and, second, that the National Labor Relations Act enjoins upon an employer absolute non-interference in respect to membership or non-membership in a union. Failure to comply with a closed shop contract with a certified union is an unfair practice 52

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V. (b) Absent conspiracy, as in this case, or any evidence of malice, the cases hold an employer exempt from liability for the exclusion of members by a union due to factional conflict or otherwise, even when the exclusion is wrongful 68

VI. The court erred in holding that the closed shop proviso of the National Labor Relations Act,

Section 8 (3), authorizing contracts which require membership in a union as a condition of employment, also requires a union holding such contract to admit all employees of the employer to membership and is not binding on the employer if the union excludes any employee on the ground of hostility of such employees to the union 76

(1) The legislative history of the Act shows that it was the intention of Congress in Section 8 (3) of the National Labor Relations Act to accept the status quo as to closed shop contracts and without extending the legality thereof under state law to authorize employers and unions to make such contracts with all the accepted features thereof 76

(2) The history of labor unions as well as the reported cases shows that the closed shop policy of unions has always included exclusion not only of non-unionists but also members of hostile or rival unions 85

(3) Recent decisions of the state courts have interpreted the closed shop proviso of labor relations acts identical in terms to the National Labor Relations Act to evidence legislative approval of the closed shop with the following results:

(a) The policy recognized is a definite exception to the principle of majority rule otherwise recognized in the Act. (b) State courts which formerly held closed shop contracts to be contrary to public policy in the face of union monopoly of the employment, now no longer recognize monopoly as a ground for invalidating closed shop contracts 92

VII. The problem here presented is for the legislature and not for the courts: The National Labor Relations Act does not purport to regulate unfair labor practices of labor unions, a deficiency which has been recognized and repaired in recent state legislation by statutes invalidating closed shop contracts where it is shown that the union unreasonably excludes employees from membership; also by statutes limiting racial and other discriminatory exclusions, thus indicating that legislative action is necessary 98

VIII. The Court erred in its failure to recognize that the Board in this case was passing upon the validity of its own acts and in such a case should not be entitled to the benefit of the presumption that its findings are valid if supported by substantial evidence, but, on the contrary, all the evidence should be considered 105

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

THE WALLACE CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

No. 66.

PETITIONER'S BRIEF.

This case arises upon a petition filed in the Circuit Court of Appeals for the Fourth Circuit, to review a decision of the National Labor Relations Board in a complaint case instituted by the Board. The petitioner here, and below is The Wallace Corporation (hereinafter called the Company), which is a Missouri corporation operating a plant for the manufacture of clothes pins, wood dishes and other wood products at Richwood, West Virginia, where the Company employed about 200 people.

Official Report of Opinion Below. The opinion of the Circuit Court of Appeals for the Fourth Circuit, dated February 3, 1944, is reported under the title "Wallace Corporation v. National Labor Relations Board et al." 141 Fed. (2d) 87, and appears in the record at page 345.

Jurisdictional Statement. The procedure for such review is provided by Section 10 (f) of the National Labor Relations Act, 29 U. S. C. 160 (f), and the jurisdiction of this Court to review the judgment or decree in question is sustained by Title 28, U. S. C., Section 347, and Section 160 of Title 29, U. S. C., subsection (e).

CONCISE STATEMENT OF THE CASE.

THE COMPLAINT.

The complaint (R. 31) was filed by the Board in June, 1942, upon written charges (R. 38) of Local Union 129, United Construction Workers' Organizing Committee, then affiliated with the C. I. O. (hereinafter referred to as the CIO), and having some connection with District 50 of the United Mine Workers (R. 312). This C. I. O. union had lost an election held with its consent by the Labor Board on the previous January 30, 1942, which election resulted in certification by the Board on February 4, 1942, of a rival independent union known as the Richwood Clothes Pin and Dish Workers Union, Intervenor in these proceedings (hereinafter called the Independent), as exclusive bargaining agent (Pet. Ex. 4, R. 60, Tr. 570). The Independent received the majority vote in the election. The consent election was held pursuant to a formal written agreement dated January 3, 1942, in settlement of a strike, whereby the C. I. O. had agreed with the Company and the Independent that such an election should be held, and (upon the insistence of the C. I. O.) the agreement provided that the prevailing union be given a closed shop contract (R. 55).

The complaint alleged interference and coercion by the Company, also domination of the Independent union. However, it is quite clear that the occasion for filing of the complaint and the principal issue raised thereby was the discharge on March 17, 1942, of forty-three employees of the Company, as alleged in the complaint, "because they were members of" the CIO and "because they were not members of" the Independent Union (R. 35). The complaint mentioned, very briefly, that the Company purported to act under a closed shop contract with the Independent and that the same was "illegal and void." The complaint neglected to mention the fact that the contract was made pursuant to prior agreement and insistence of the CIO with a union certified by the Board as collective bargaining agent.

It is notable that the Board included in this complaint, the charge by the CIO of company domination and interference with the Independent Union, but did not allege that the election and certification were invalid, and indeed the Board itself has in its decision found no infirmity in the election or certification, other than the **subsequent** closed shop contract and performance thereof.

The Board's complaint also neglected to state that in connection with the strike settlement, the CIO had withdrawn, in a formal document approved by the Board, a charge filed with the Board during the strike, alleging that the officers of The Wallace Corporation were sponsoring, aiding and abetting a company union (R. 312).

In other words, after it lost in the election held by the Board, with its consent, the CIO made a charge which necessarily ignored and repudiated the truce and the withdrawal of the same charge. It also repudiated the CIO's own condition, namely, that the union certified should have a closed shop, this change of heart occurring when it appeared the condition was insisted upon by the Independent.

The Board in its complaint sponsored and necessarily supported this repudiation. The Board neglected, as above stated, to mention this strike-settlement agreement and the withdrawal of the charges which are revived in its complaint.

THE BOARD'S DECISION.

After hearing before a trial examiner and argument before the Board on November 11, 1942, the Board wrote a decision dated February 27, 1943, sustaining the complaint. Mr. Leisserson, who heard the case, did not sign this decision and one of the remaining members of the Board wrote a separate opinion. Petition for review was thereupon filed by the petitioner to the Fourth Circuit Court of Appeals. The Board then vacated and set aside its prior opinion and decision and the case was re-argued before the Board on May 13, 1942. After this hearing the Board again sustained the complaint in decision and order of June 7, 1943 (R. 1), which is the subject of the present proceeding for review. The order of the Board requires disestablishment of the Independent, reinstatement of the forty-three employees, with a penalty of what is now several years back pay. The Company protected its position by appropriate motions to dismiss the complaint (R. 47, 169, 285), by appropriate objections to the admission of evidence of facts antedating the settlement agreement (R. 79), by saving exceptions and motions to strike (R. 167, 286), and by its specifications of error (R. 327).

The Court of Appeals refused to disturb the order in opinion dated February 3, 1944, and while showing some sympathy with the petitioner because of its efforts to reinstate the employees, the court said the penalties imposed by the Board were not within the province of the court to disturb.

BRIEF STATEMENT OF THE ISSUES.

The following brief narrative of facts is presented to bring into relief the issues in the case, at the risk of some repetition in the argument. The petitioner contends as the first major issue, that neither the Board nor the Court have met its contention, which is far from a technical one, that the strike settlement agreement, being valid, should not and cannot be set aside, and the prior events re-examined. With respect to events following the settlement agreement of January 13th (R. 54), these were properly examined by the Board and must be here reviewed because the petitioner has challenged as the second major issue both the findings of discriminatory intent in the discharge and the law of the closed shop as announced by the Board and the Court. Both the Board and the Court have found that the Company was guilty of unfair practice in entering into a closed shop contract with the certified union, because it knew and was notified of the hostility between the majority and minority unions and that the majority union would exclude at least some employees to protect its union. On this issue the petitioner contends that it was bound by contract to act as it did, and was not in a position to impose conditions such as an "open union" clause in its closed shop contract, or certainly not required to insist upon them at the risk of further strife, which the company believed would result (R. 224).

As will be more fully set forth in the argument on this point, the Company contends that the closed shop policy necessarily involves exclusion; that a union has full control of its own membership; that the exclusion of members of hostile or rival unions is a common incident in the application of the policy; that the policy necessarily involves discrimination by the union; that, in any event, the employer is forbidden by the law to interfere with

union membership and certainly should not be charged with the responsibility of examining into and passing upon the motives of a union in the determination of its membership, and add employer interference to union discrimination.

It should be noted in this connection that no "conspiracy" between the Independent and the employer had been charged or found by the Board or by the Court below. The Board is confused on this point; it alleges employer "acquiescence" and while denying conspiracy, says the discharge in compliance with the closed shop contract was "because of prior union activity," confusing the union's motives with the employer's. There is nothing in the record to show that when the layoff occurred the employer had knowledge of the reasons for the exclusion, other than the hostility which had been expressed, and no express knowledge of any distinction between CIO members admitted and excluded by the Independent and no knowledge of any distinction between non-members who had been excluded against their wish and non-members who had declined to join the Independent. The finding of the Court below is clearly erroneous on this point. The employer took back all employees after the strike. Many were admitted to the Independent and remained in employment. The employer never showed any signs of discrimination against the CIO in this discharge.

It is realized that a case of this kind does not turn on the niceties of logic. The conduct of the parties throughout this difficulty is necessarily of interest to the Court and has had its effect upon the conclusion of the Court. The Board has suggested in previous argument that the good faith of the employer is not in issue, but obviously the findings of the Board cannot fail to reflect on the ultimate issues. The inquiry here searches the motives of the employer, notably into the problem of its

crimination between employees. It is a question of motive. The gist of the Board's complaint and finding is directed at the **reasons** which prompted the action of the employer. The complaint itself states that the layoff by the employer was "because the employees were members of the CIO," and the Board's conclusion is in this identical language. The petitioner feels impelled, therefore, to discuss the facts and to demonstrate that, as not infrequently happens, it was caught here between two extremes of view, the attitude of a militant CIO union, aggressive even to the point of violence, and the extreme right-wing attitude of the Independent's leadership which considered the CIO to be "radical" (R. 115), backed no doubt by townspeople who deplored the entire shut-down. A great deal has been said and no doubt felt in the case of sympathy for the discharged employees. Little has been said about the hardship of the strike upon the employees, upon the Company and upon the townspeople.

The Company sought to avoid the strike by a Labor Board election at the outset (R. 157). The CIO voted this proposal down (R. 85). The Company settled the strike on the CIO's own terms and it performed its settlement as it felt required to do. Certainly, the drastic penalties now imposed upon it are not warranted on the record.

The following narrative of the facts is directed therefore toward an over-all consideration of the conduct of the parties.

BRIEF NARRATIVE OF THE FACTS.

A campaign to organize the factories, saw mill and timber workers in Richwood was in process in the summer of 1941 by District #50, United Mine Workers of America, and United Construction Workers Organizing Committee (R. 312). A strike was called by the CIO union

on September 25, 1941 (R. 76), which closed the plant for the period to January 13, 1942. The Board in its opinion and findings in this case cites various conversations between certain foremen and members of the CIO, mostly concerning the attitude of the Company's President toward the CIO **prior to the strike.** As admitted by the Board, three out of four of the foremen involved were put on the stand and denied these statements. The Board disbelieves their evidence and credits the CIO members, all highly interested in the outcome of the case. The conversations had reference to the attitude of the Company's officers toward the union. Both the Superintendent of the plant (R. 222) and the President of the Company, who was its sole stockholder, testified on this point and denied that they had ever made the statements in question (R. 278). The President of the Company stated unequivocally that he believed in collective bargaining and did not take an antagonistic attitude to the CIO but was opposed to the closed shop (R. 279), a comment occasioned no doubt by the current discussion of this issue in the steel and mining industries.

At the time the union made its demands and declared the strike there had been a complaint made in respect to one Harvey Dodrill. The merits of this complaint were not revealed in this hearing. Dodrill admitted on the stand, however, that at the time the strike was called it was the position of the Company that they wanted a Labor Board election to determine representation and the CIO was insistent upon a card count (R. 156, 157, 161).

In view of the alleged "anti-union" attitude of the Company, some emphasis should be given to the fact that the Company did not refuse recognition to the CIO but wanted that matter adjudicated by the Board. In view of the fact that the Board only credits the testimony of CIO witnesses in this case, the following testimony on

that point is offered in support of the point that the Company wanted the question determined by the Labor Board, namely, the testimony of this witness, Dodrill, called by the Board, who was President of the CIO at one time (R. 157):

> "Q. Now, Mr. Dodrill, after the strike there were some more negotiations about an election, were there, with your union? A. Yes, sir.
>
> Q. Now, you correct me if I am wrong: Wasn't it about the same way all the way through, that you folks wanted a card count and the Wallace people wanted an election? Isn't that about it, most of the time there? A. Yes, sir."

Mr. Wallace testified that he favored a Labor Board election at the outset (R. 270). Davis, the Superintendent, also so testified (R. 197).

But Griffie, another President of the CIO, also testified that a Labor Board election had been offered and that the CIO voted on the proposal and voted it down (R. 85).

The issue of the strike was recognition of the CIO. The employer wanted a fair determination of majority, to which it was entitled, on a Yes or No election of the type then held by the Board.

From the beginning of the strike to the settlement agreement the evidence of establishment, maintenance or assistance to the Independent Union is of the most tenuous kind. The Independent Union appeared on the scene about October 4, 1942. There is evidence "from which it could be inferred," as the Court says, that the organizers expected that the first meeting was to be held at the house of one of the foremen, but it was not held there (R. 90, 91, 93). It was held at the house of one Landy Groves, a machine tender (R. 89, 102). The meeting was at sea as to what procedure to follow, and Groves' wife, telephoned to Miss Weese, office secretary and man master

of the company, a confidant of the employees in many matters, who was at a meeting of the City Council, for which she acted as Recorder. She referred the inquiry to the Greater Richwood Federation, the local chamber of commerce (R. 232, 233), and as a result B. E. Thompson, the editor of the Nicholas Republican, the local newspaper, was called in and assumed leadership of the Independent. He was connected with the chamber of commerce but not its president at the time (R. 232 and 237). He hired a lawyer (R. 101), one Ritchie, who acted for the union throughout. Immediately after establishment of the Independent, namely, October 9th, the CIO filed its complaint or charge regarding the discharge of Harvey Dodrill and the maintenance of the company union (Bd's. Ex. 5, R. 312, 138). The Independent later, on October 31, 1941, requested certification from the Board, which request was not acted on by the Board (R. 12-13), having asked for recognition by the Company on October 14 (R. 199). During November the Board sent a representative to investigate the charge of domination (R. 138). The President and Vice President of the Company went from St. Louis to Richwood to attend the investigation but received no consideration from the representative of the Board in respect to this investigation, he having already concluded, when called upon to hear witnesses, that the union was company-dominated (R. 201, 272), basing the conclusion on conversations with the CIO. The grounds on which he so concluded, as far as we can judge from the record, is that the Independent was officered by two employees of the company who, while not foremen, he considered represented the company. One of these was Carm Reese, President of the Independent, who was an oiler in the mill room and who had no right to hire and fire or any substantial supervisory duties (R. 206, 207), and the other was Lundy Groves, who was one of four machine tenders in the lathe room and who likewise

had no right to hire and fire but occasionally took the place of the foreman in that department when he was ill (R. 209, 223).

The company's conduct in the subsequent period is not questioned. The strike continued with considerable violence and the Company did nothing to recognize either union. The Company made an effort to get the people back to work, leaving the representation question to be determined in an orderly manner, and so stating in its call (R. 311), but without discrimination as far as the unions were concerned.

THE SETTLEMENT AGREEMENT.

On December 30, 1941, the strike was proceeding into its fourth month and on that date the Company received the following telegram from a CIO representative (Resp. Ex. 6, R. 286, admitted Tr. 571):

"Charleston, W. Va., Dec. 30.

Charles Davis, General Manager,
The Wallace Corporation,
Richwood, W. Va.

In the interests of national unity, for the sake of harmony and to prevent the possibility of bloodshed, if and when you attempt to open your plant, I have influenced your workers to make you a further compromise proposition, which is as follows: Local Union 129, UCWOC, will agree, with the approval of the National Labor Relations Board, to enter into a consent election, with you and your company union, on the condition that when we prove a majority and become the exclusive bargaining agency for all your employees, that as a condition of employment all eligible employees must become members of Local Union 129, UCWOC. Wire answer.

George J. Titler,
Field Representative UCWOC."

While this proposal was rejected until law and order were restored in Richwood and the Independent's consent obtained (see Board Opinion, R. 14), it became the actual basis for a settlement on the following January 13th. The telegram evidences the bitterness of feeling and also the original insistence of the CIO upon a closed or union shop. It also indicates the confidence of the CIO that it would prevail in an election. It also evidences the contention of the CIO even at that time that the Independent was a "company union." Formal charges of company domination had theretofore been filed by the CIO and the investigation by the Board resulted in the conclusion of the Board's representative that the charges were justified.

STRIKE SETTLEMENT.

Following this telegram negotiations in settlement of the strike were opened, and in the early morning hours of January 13th the CIO and the Independent and the Company signed an agreement (R. 54, Tr. 570) that the plant should be opened at 8 a. m. the same day; that everyone would return to work; that the Company would not influence in any way its employees for or against either union and the unions would not exercise any coercion. The Company agreed to recognize, as exclusive bargaining agent, whichever union was proved, by a vote conducted by the Board, to represent a majority of its employees and to start negotiations immediately after the result of the election was determined and to grant a union shop. The following clause about the union shop was contained in the settlement agreement (R. 55).

> "The company further agrees that if either union is proven to represent a majority of its employees, by said vote, it will recognize a union shop, providing

that the company shall at all times retain the right to suspend, hire (sic) or discharge any employee for proper and just cause."

Wage adjustments were to be retroactive.

Following the settlement, the parties appeared at the office of the Board's Regional manager and read the settlement agreement (R. 275). Thereupon two agreements were drawn, dated January 19th, one to "dispose of" and for withdrawal of the charges of domination and other charges (R. 53), and the other for a consent election in customary form (Resp. Ex. 3, R. 56, Tr. 570). Both agreements were approved by the Board's Regional Director in writing after signature by all the parties. The charge involving Dodrill was left to the Board's decision.

The employees all returned to work without distinction as to union affiliations and the election was held on January 30th. No formal objections were filed and the Board, on February 4th, certified the Independent as the exclusive bargaining representative for the employees in the plant (R. 60). The Special Examiner for the Board who heard the case purported to find acts intervening between the date of the settlement agreement and the election evidencing a breach by the petitioner of its agreement not to interfere or discriminate in any way. The Board, however, in its majority decision, considered the events "too trivial to justify setting aside the settlement" (R. 24) and the Board has accordingly disposed of this issue.

The Closed Shop Contract.

In the strike settlement of January 13th the Company had agreed, immediately after the selection of a bargaining agent, to open negotiations and reach a wage settlement to be retroactive to January 13th. The language of this settlement agreement providing for the closed shop is set forth above. Negotiations extended from February

4th to March 7th when the final agreement was signed. (See Agreement R. 61, Tr. 570). The evidence is uncontradicted that the Company was reluctant to enter into a closed shop agreement. Mr. Thompson testified that The Wallace Corporation opposed the closed shop clause in the negotiation of this contract (R. 109). He said: "Mr. Wallace very vigorously opposed it." Mr. Christmas, vice-president of the Company, stated that one of the reasons why the first draft of the contract with the Independent was rejected was because it contained the closed shop clause (R. 263). The Independent was, however, insistent upon the closed shop clause and to show that the Independent was so insistent the Company introduced in evidence at the hearing Exhibit 8 (R. 287, Tr. 571), a letter dated February 28, 1942, a week before the contract was finally signed, on the letterhead of the Nicholas Republican, and signed by Thompson for the Independent Union which gives the Independent's reasons for insisting upon the closed shop. He characterized the clause as one of the "musts" in the contract and said that no counter-bargaining propositions which might exclude it would be agreed to. He calls attention to the fact that his union was certified and mentions the fear of members of the union that several new employees had been given jobs who were favorable to the CIO. He said he was afraid his majority would be jeopardized. He said the only protection he could see for the new union was the closed shop clause and cites the authority of a "research institute." His emphasis was on additional employees. He then refers to present employees "whom our members have declared by unanimous ballot they will not work with, whose presence at the plant is unfavorable to our interests."

The contract which was signed by the Company contains a union shop or closed shop clause by which the Company agreed that all of the employees of the Company should be members of the union in good standing.

After the contract was signed the Company posted the union's notice to employees of the terms of the contract (Resp. Ex. 2, R. 291, Tr. 612). This notice referred to the provisions of the contract and notified all employees to govern themselves accordingly.

When the ten days expired which was given to employees in which to join the union, forty-three employees were laid off by the Company. In view of the statement of the court below, that the Company at this time "knew that thirty-one of these employees had applied for membership in the Independent and had been rejected," it is well to state at this time that there is no evidence whatever in the record to show that the Company knew how many employees had refused to join the union and how many had been refused admittance. The facts in the matter were stipulated into the record at the hearing before the Board beginning July 9th by request of counsel for the Board. It was stipulated at the hearing that twelve of the forty-three did not apply for membership in the union and that thirty-one applied and their applications voted upon by members of the organization in the regular manner as provided by the constitution and by-laws of the union but said application did not receive the required number of votes to permit them to become members (R. 98, 99, 100). There is no evidence in the record that the Company knew these facts at the time and there is no evidence that the Company knew anything about the membership affiliations of the men and women who were excluded by the union. The evidence in the record is even meager that the excluded members were members of the CIO but there is no evidence that the Company even knew that they were CIO members. They had all been working up to that time.

The evidence of the attitude of the Company's officers when they heard of the lay-off is clear. Mr. Wallace testified that the Regional Director called him by long distance

telephone and informed him of the facts and he stated he did not believe it, but after confirming the facts he took action to try to get the people reinstated (R. 278). He investigated and counsel reported the results ten days later (Resp. Ex. 27, R. 307, Tr. 939). The attorney for the Company went to Cincinnati to talk to the Regional Director about the matter and conferred with Thompson and his attorney representing the Independent union, without result.

The attitude of the Company is fairly well set forth in Respondent's Exhibit 9 (R. 289, Tr. 571). The facts in this matter are discussed in more detail under Point II of the argument below. There is no doubt, however, that the Company protested and sought to get the Independent to reinstate the employees, orally and in writing, and even at the eve of trial the Company declared that it was ready to take any steps necessary to put the people back to work and suggested that the Independent confer with the Board and attempt to make arrangements to this end (R. 68, 69). The Independent's proposal was not satisfactory to the Board (R. 70). The Board's proposal was not satisfactory to the Independent (R. 70). The Company was left in the middle.

There is also no doubt that the act of excluding the employees from membership in the Independent was the act of the membership of the Independent. The stipulation and evidence both support the conclusion that the employees excluded were excluded by vote of the membership (R. 99).

SPECIFICATION OF ERRORS.

The petitioner will rely in its argument upon the following specifications of error, as set out in the petition for certiorari and amply covered in the errors assigned in the Petition to Review in the court below (R. 327).

Errors on Issues of Fact.

1. The Court erred in holding that there was substantial evidence to support the Board's finding that the Company discharged the forty-three employees mentioned in the order because of prior union activity or with discriminatory intent.

2. The Court erred in respect to the following erroneous conclusions which are unsupported by the evidence:

(a) That at the time the Company discharged the forty-three employees "it knew that thirty-one of these employees had applied for membership in the Independent and had been rejected";

(b) That the Company "acquiesced in the conduct of the Independent union" for the reason that (to the extent that such finding implies silent approval or absence of protest) there is no evidence to support such conclusion and for the further reason that such holding ignores the admitted fact that the Company was bound by the strike-settlement to make a union shop contract and bound by such union shop contract to deny employment to non-member employees;

(c) That the conduct of the Company was "oppressive and high handed" for the reason that there is no evidence to support such conclusion and for the further reason that said conclusion is inconsistent with the Court's later statement that the conduct of the Independent union was high handed and that the Company merely acquiesced in the same.

Errors of Law (Closed Shop).

3. The Court erred in holding that a closed shop or union shop contract authorized by section 8 (3) of the Act was invalidated by knowledge on the part of the employer, of the intention of the union to exclude from membership employees hostile to the union (members of a rival union which had conducted a violent strike) and in holding that the Company was under a duty to disregard its union shop contract in order to "protect" such excluded employees and under a duty to insist upon their admission to the union.

4. The Court erred in holding that the closed shop proviso of the National Labor Relations Act [Section 8 (3)] validating contracts which required membership in a union as a condition of employment also requires a union holding such contract to admit all employees of the employer to membership if they apply and is not binding on the employer if the union excludes any employee on the ground of hostility of such employee to the union.

5. The Court erred in holding that the discharge of eleven out of the forty-three employees of the Company who were non-members of the union was discriminatory, it being stipulated and conceded that said eleven employees never applied for membership in said Independent union, for the reason that there is no evidence to support the charge of discrimination and for the further reason that even under the theory of the Court there was no act of discrimination against said employees on the part of either the Independent or the Company.

6. The Court erred as a matter of law in holding that the closed shop proviso of the Act [Section 8 (3)] was never intended to authorize the majority (referring to the majority union) to exclude and thereby discriminate against a minority (referring to the members of the minority union) because the majority concluded the minority

were hostile to the majority union—for the reason that the Act does not purport to regulate and prohibit unfair labor practices of union organizations and expressly legalizes a closed shop contract.

Errors in Respect to Administrative Discretion of the Board.

7. The Court erred in holding that it was within the administrative discretion of the Board to disregard the strike-settlement agreement approved by the Board, and to disregard the certification of the Board which followed, and erred in holding that such settlements are not to be observed in all cases but should only be observed "ordinarily," and in holding that such administrative orders of the Board may be disregarded, but not "lightly."

8. The Court erred in sustaining the Board's denial of the petitioner's motions to dismiss, for the reasons (a) that it was an abuse of administrative discretion for the Board to file and prosecute a complaint involving charges of domination of an alleged company union when the same charges had been previously withdrawn, with the full knowledge of the facts and approval of the Board, pursuant to a written strike settlement of which the Board was fully advised; and (b) that the Board's certification, after a consent election was, absent some unfair practice or assistance affecting the election, conclusive as to all parties, of the capacity of the union to make a closed shop contract, and not subject to be set aside by reason of facts antedating the consent election agreement and known to the Board.

9. The Court erred in its failure to recognize that the Board in this case was passing upon the validity of its own acts, and in such a case should not be entitled to the benefit of the presumption that its findings are valid if supported by substantial evidence, but on the contrary, all the evidence should be considered.

ARGUMENT.

Introduction. The petitioner, pursuant to its specifications of error in the Petition for Certiorari, argues first, that the settlement contract of January 13, 1942, was a valid and binding contract and that it was not within the power of the Board to disregard such an agreement and its subsequent performance, such invalidation of the contract being an abuse of administrative discretion. Second, the petitioner challenges the finding of the Board that there was in fact any discriminatory intent in the discharge of the employees in this case and contends that they were discharged not because of prior union activity or affiliation but because of the closed shop contract; there is no evidence to support the Board's finding whatever, but only evidence to the contrary. The third point of the argument brings us down to the position of the Board and the Court that the closed shop contract was illegal and constituted an unfair labor practice in and of itself because of the knowledge of the employer that the union proposed to exclude hostile employees.

On this latter point the petitioner first proposes to show that far from being an unfair labor practice, the employer was correct in its solution of the dilemma in which it was placed, namely, the choice of violating its contract for a closed shop and facing further strikes on the part of the majority union, or, in the alternative, complying with its contract and discharging non-members of the union even though the demands inflicted hardship upon such non-members. In support of the reasonableness of its action, the petitioner will show that it was supported by two undisputed principles of law, namely, the undoubted control of a union of admission to its own membership, and second, the injunctions of the National Labor Relations Act upon an employer not to interfere in union membership. In further support of its position the petitioner will

review the somewhat meager authorities as to the right of a union to exclude from membership employees who are members of a rival union or otherwise considered hostile to the union's interests. On this point petitioner will show that exclusion from membership by unions under closed shop contracts, with consequent loss of employment, is countenanced by the courts if the policy is based on considerations of the welfare and preservation of the union rather than on personal ill-will or malice. And lastly, the petitioner will show that the decisions have never held an employer liable to penalties or damages where the employer complies with a closed shop contract even where exclusion is unreasonably or wrongfully required by a union. The petitioner will show that the Labor Board and the Court have mistaken the remedy in this case by penalizing the employer for the acts of the Union.

The petitioner will show that the National Labor Relations Act proviso in Section 8 (3) does not change the law of the closed shop but was intended to accept the closed shop policy in status quo, with all its inherent exclusions, and that the closed shop policy was accepted as an exception to the principle of majority rule otherwise recognized by the Act; further, that the trend of the state court decisions on similar closed shop provisos is that such provisions are a public recognition of acceptance of the closed shop contract even in the face of monopoly on the part of the union.

Lastly, the petitioner proposes to show that the problem here presented is for the legislature and not for the courts; that the National Labor Relations Act does not purport to regulate unfair labor practices of labor unions and that this deficiency has been recognized and repaired in recent state legislation by statutes specifically invalidating closed shop contracts where it is shown that the union unreasonably excludes employees from membership, also by statutes limiting racial and other discriminatory ex-

The points of the argument are therefore as follows:

I. The court erred in holding that it was within the administrative discretion of the Board to disregard the strike settlement agreement approved by the Board and to disregard the certification of the Board which followed, and erred in holding that such settlements are not to be observed in all cases but should only be observed "ordinarily" and in holding that administrative orders of the Board may be disregarded but not "lightly."

II. The court erred in holding that there was substantial evidence to support the Board's finding that the Company discharged the forty-three employees mentioned in the order because of prior union activity or with discriminatory intent, more especially because all of the evidence is to the contrary.

III. Far from being an unfair practice, the decision of the employer to abide by its contract was correct in this case for the following reasons:

(a) The employer in making the closed shop contract in this case did no more than it was obliged to do, and the court's opinion to the contrary is in error.

(b) The employer was supported by two well-settled principles of law, namely, that a union has exclusive control of admission to its own membership, and, second, that the National Labor Relations Act enjoins upon an employer absolute non-interference in respect to membership or non-membership in a union. Failure to comply with a closed shop contract with a certified union is an unfair practice.

IV. On the existing authorities *quaere* whether the court should hold that it is unreasonable or unlawful for a union to exclude from its membership members of a rival union or employees otherwise hostile.

V. (a) Even if the exclusion from membership in the union were unreasonable, the act is that of the union and not that of the employer, for there is no evidence of discriminatory intent on the part of the employer.

V. (b) Absent conspiracy, as in this case, or any evidence of malice, the cases hold an employer exempt from liability for the exclusion of members by a union due to factional conflict or otherwise, even when the exclusion is wrongful.

VI. The court erred in holding that the closed shop proviso of the National Labor Relations Act, Section 8 (3), authorizing contracts which require membership in a union as a condition of employment, also requires a union holding such contract to admit all employees of the employer to membership and is not binding on the employer if the union excludes any employee on the ground of hostility of such employees to the union.

(1) The legislative history of the Act shows that it was the intention of Congress in Section 8 (3) of the National Labor Relations Act to accept the status quo as to closed shop contracts and without extending the legality thereof under state law to authorize employers and unions to make such contracts with all the accepted features thereof.

(2) The history of labor unions as well as the reported cases shows that the closed shop policy of unions has always included exclusion not only of non-unionists but also members of hostile or rival unions.

(3) Recent decisions of the state courts have interpreted the closed shop proviso of labor relations acts identical in terms to the National Labor Relations Act to evidence legislative approval of the closed shop with the following results:

(a) The policy recognized is a definite exception to the principle of majority rule otherwise recognized in the Act.

(b) State courts which formerly held closed shop contracts to be contrary to public policy in the face of union monopoly of the employment, now no longer recognize monopoly as a ground for invalidating closed shop contracts.

VII. The problem here presented is for the legislature and not for the courts: The National Labor Relations Act does not purport to regulate unfair labor practices of labor unions, a deficiency which has been recognized and repaired in recent state legislation by statutes invalidating closed shop contracts where it is shown that the union unreasonably excludes employees from membership; also by statutes limiting racial and other discriminatory exclusions, thus indicating that legislative action is necessary.

I.

The Court Erred in Holding That It Was Within the Administrative Discretion of the Board to Disregard the Strike Settlement Agreement Approved by the Board, and to Disregard the Certification of the Board Which Followed, and Erred in Holding That Such Settlements Are Not to Be Observed in All Cases But Should Only Be Observed "Ordinarily," and in Holding That Such Administrative Orders of the Board May Be Disregarded, But Not "Lightly."

It is a unique feature of this case that the CIO union and the Independent and the Company entered into a formal written agreement in settlement of the strike, dated January 13, 1942 (Resp. Ex. 2, R. 54, Tr. 570). It should be noted that this contract does not purport to compromise or settle any charges of unfair labor practice or of domination. It settles a strike and its issues.

The settlement contract of January 13, 1942, has never been challenged as to validity or fairness. There is in this case no ground for holding that the Company concealed anything from the parties or overreached the parties in inserting the closed shop provision in this contract. The CIO had originated the demand for the closed shop and the Company had opposed it (R. 271); the Independent was at this point indifferent (R. 277). The Board was, although fully advised, not a party to the contract but the Board approved the settlement and was a necessary party to its performance since the contract provided for a consent election and made the Board the arbiter of the problem of bargaining agency.

The strike-settlement agreement is of course fundamental to the case. The subsequent certification by the Board at the consent election was merely a part of the performance of this agreement. And, of course, the execution of a closed shop contract with the Independent was also in performance of this agreement.

The Board is hopelessly confused as to the validity of this contract. The fairest interpretation of its opinion is that while the employer was bound to execute a closed shop contract, it was discharged from this obligation by knowledge of the union's intention to exclude from its membership an undetermined number of employees whom the union considered hostile for reasons undisclosed. The purpose of the union is made the purpose of the employer.

The court on its part, gives the matter scant consideration. The court takes the position that the Company's obligation meant that the employees would be required to become members of the successful union, not that the union had a right to control or exclude from employment. The court characterizes this as "an improper purpose"; that the Company had not agreed to enter into a contract "to do an injustice"; that the Company should have inserted in the contract a provision for the minority "that would have protected their rights."

It should be noted in passing that the court was not very careful in taking this position because it affirmed a penalty against the Company for discharging employees who never even asked for admission to the union. We doubt if the court would go so far as to suggest that it was the Company's duty to insist upon these unwilling employees joining the union as well as to insist that the union admit the members which it excluded. It is clear, however, that the court ignores this obvious distinction.

The nature of the closed shop contracts and the rights of a union to exclude under such a contract are discussed fully in other points of this brief [Infra Points III (3) and IV]. It should be said at this point, however, that the contract in this case contained the obligation and agreement of the Company that all its employees should be members of the union. It did not contain any agreement on the part of the union to admit all employees of the Company. The position of the court results in this holding: that no closed shop contract is valid unless it includes an "open union" clause whereby the union is obligated to admit to membership. There is no such clause in this contract.

The open union clause is occasionally found in closed shop contracts and we take it that the court will recognize that the more liberal unions do not oppose it. It is, however, altogether too idealistic a notion of the policy of the closed shop to assume the open union is a necessary incident thereto. See Points III (3) (e), and IV (2) below.

Unfortunately, the employer in this case was not in a position to prescribe conditions. He had agreed to a closed shop. The employer assumed, and we believe correctly, that the union would retain control of its own membership. The very omission of a covenant on the part of the union to admit all the employees is significant of the intention in this case to adhere to what may be fairly called the general rule.

The Court and the Board alike are most unfair to the employer in this case in assuming that the imposition of such a condition would be a simple matter. Anyone familiar with trade union negotiations knows that in the presence of rival unionism, whether due to jurisdictional disputes or factional strife as that between the CIO and the A. F. of L., or between any affiliated union and an independent union, it is the unions and not the employers who object to the open union clause. The reason: Fear that the union itself will be undermined.

The legal authorities on this matter of the right of a union to exclude are fully discussed under the subsequent points of this brief, with citations of traditional writings on the subject. It would be perhaps a fine thing if trade unions were open to all comers and closed shop contracts were invalidated by any contrary policy. As shown below, that has never been trade union policy, and it is the law only where, in recent years, the legislatures of the states have so decreed.

The injustice which the court and the Board have inflicted upon this employer is the ruling that the employer (his hands tied by the present law protecting trade unions) should be called upon to protect minorities which the law does not protect; that he should be called upon to reform the closed shop policy which is approved by the law; that he should be called upon to supervise membership admission by the union and examine its motives for exclusion when the courts themselves have never undertaken such an obligation; that he should interpret his obligation to make a closed shop contract so as to recognize the right of his employees to join a union when the courts have refused to recognize any such right; that in collective bargaining, faced with an obligation to make a closed shop contract, he should, at the expense of further strife and discord and the closing of his plant, inform one of the factions, after a long and bitter factional strife, and con-

plaints of interference, that he is the judge of whom they should admit to their union.

This section of the brief is, therefore, directed to the question of the validity of the strike settlement and the certification by the Board. The Board itself finds no infirmity in the certification, but it is suggested by the court below that the certification by the Board is the central issue in the case, rather than the settlement contract.

The Certification. Let it be plainly understood that in this case the certification was no mere administrative act of the Board. It was an arbitration, pursuant to the settlement contract, of the question of representation. The certification was a step in the performance of a settlement agreement and the Board participated in it upon terms by which the Board itself represented that the certification disposed of prior charges. In the 8th Annual Report of the National Labor Relations Board, page 49, the Board refers to its policy on consent elections and certifications and says this:

> "However, the Board does not ordinarily order elections in the presence of unremedied unfair labor practices, whether merely alleged or already found by the Board, unless the labor organization which instituted the charges has agreed in advance that it will not rely upon the unfair labor practices as a basis for objecting to the conduct or result of the election. The Board orders an election only when it is satisfied, after considering all evidence, respecting the employer's compliance with a prior order concerning unfair labor practices that an election, free from all employer compulsion, restraints and interference, can be held."

The certification in this case was held on that basis, and the Board insisted upon withdrawal of all pending charges before conducting this consent election and acting as arbitrator of the question of representation. A formal consent

election agreement was executed on January 19, 1942 (R. 56, Tr. 570). At the same time a collateral agreement of the same date was executed by all the parties in which the union requested withdrawal of the charges. This agreement recites that the parties "wished to dispose of such charges in a mutually satisfactory manner." This agreement was approved by the Regional Director of the Board (R. 53-54).

It should be noted also that the company fully performed this agreement on its part; that the Board itself has expressly found no violation of this agreement on the part of the employer by acts intervening between its date and the date of the election.

The Board in its opinion and decision applies to the settlement contract of January 13th the principle which it has announced as to certifications, namely, that if a subsequent unfair practice appears the Board may go back of the certification. This, of course, may be true of an administrative act of the Board in pursuance of its own powers under Section 9 (c) to determine representation. See **Utah Copper Co. v. N. L. R. B.** (C. C. A. 10th, 1943), 139 Fed. (2d) 788, certiorari denied, 1943, 88 Law Ed. 841. But in this case the certification is part of the performance of a contract and was stipulated and agreed to by the parties, and in such case a contractual element is added. The distinction here made has been properly recognized in a state court case where there was a consent election which the independent sought to set aside for unfairness. The federal courts all held that this could not be done because the federal courts had no jurisdiction, but the state court held:

> "This private written agreement is nothing more than an ordinary contract between private individuals for the arbitration or decision by reference of a disputed question."

and held that the court had jurisdiction to determine whether the election was fairly held. **Sun Ship Employees, Inc., v. Industrial Union etc. CIO and Sun Shipbuilding and Dry Dock Co.** (Pa. Court of Common Pleas, 1944), 8 Labor Cases, Sec. 62,341.

It should be noted in our case that the election is not challenged. No objections were filed and the Board finds no infirmity in this arbitration pursuant to the settlement contract. There is no finding of any unfair act between the date of the settlement and the date of the election.

It is, therefore, one thing to go behind a mere finding of the Board in the exercise of its own determination of the bargaining agent, and quite another thing to set aside a settlement contract and disregard an arbitration award which is admittedly valid. The Board takes the position that although the tri-partite agreement was valid when made, performance of its terms did not require the respondent "to become a party to the Independent's plan." The Board says: "On the contrary, when this unlawful scheme became known to it the respondent not only had a right to abrogate the tri-partite agreement, but also was under an obligation to do so." This finding that the company became a party to the "unlawful" act of the union is contrary to the admission of the Board that there was no conspiracy and the same admission of the court. The finding also assumes, without examination, that the act of the union was unlawful simply because the employees had been engaged in a prior conflict. This whole assumption of the Board is challenged in a later portion of this brief.

The Court on its part fails to give any consideration to the question whether it is within the province of the Court, let alone the Board, to set aside a valid contractual settlement agreement, settling three and a half months of industrial strife, and made by the parties with their eyes open.

The fact that the court ignores the gravity of the problem is evidenced by its remark in its opinion: "In the absence of the consent election and the certification of Independent as a bargaining agent by the Board, there could be no question as to the correctness of the Board's order." The settlement contract is not here mentioned as a factor. The court emphasizes the duty of the Board to prevent unfair labor practices and again emphasizes the certification, but not the contract, when it says that the fact that the Board "may have certified a union as a bargaining representative, does not limit its power later to declare such union to be company-dominated and order its disestablishment if such course is seen to be proper in the light of subsequent developments." But here the certification was no mere act of the Board. It was part of a contractual agreement. The only other reference to the contract which is made by the court is in its quotation, with approval, from the Board opinion, of the single sentence: "It is true that under the terms of the election agreement the respondent was bound to execute a union shop contract with the victorious union."

This passage from the decision of the Board indicates again that both the Board and the Court did not meet squarely the problem of the power and propriety of the Board's action in setting aside and vacating a strike-settlement agreement, the validity of which is not challenged in the complaint or questioned on the evidence. The Board's decision fails to disclose any other reason for setting aside the settlement.

The parties knew that unfair practices had been charged and investigated. The Board's agent had conferred with the Company and with the CIO about the charge and it's agent had even tentatively concluded that it was well supported on reasons not satisfactory, it is true, to the Company (Ex. 17, R. 293, Tr. 924). The CIO union had claimed company unionism even in its offer of settlement (Ex. 6, R.

286, Tr. 571). The Company on its part had never recognized the Independent. If any recognition was accorded it, this recognition came from the CIO's proposal and from the Board in insisting upon withdrawal of the charges and the subsequent naming of the Independent in the consent election agreement and on the ballot. There was certainly no misrepresentation and no over-reaching and nothing but reluctance on the part of the Company as far as the closed shop aspects were concerned.

Did the Board and the Court have power to set aside this settlement?

The only express theory of the Board is that subsequent unfair practice (in this case, the performance of the agreement itself) warranted a re-examination of preceding events to find out whether there was evidence of unfair practice preceding the settlement. As above pointed out, it is a far step from the doctrine of the Board's decisions on certifications to the doctrine that the Board may re-examine the basis of a settlement contract terminating a strike.

We have not contended that the certification was a judgment and that the rule of res adjudicata applies. We complain of the unfairness of disregarding the settlement. The bargaining agent might have been determined by a card count or by arbitration. It was far better to call in the Board to conduct a fair election, advising it of what was going on. It is significant that the Board itself refused to conduct such an election unless the charges were withdrawn. As a matter of fact the Board has found no infirmity in the election and certification (R. 24), so that that part of the performance of the settlement contract is eliminated from attack.

If this court is persuaded that the making of the closed shop contract itself, on March 13th, was not an unfair practice in view of the contractual obligation of the Company to make it and in view of the control of the union

over its own membership and the statutory obligation of the employer not to interfere in such matters, then we have to consider solely this question of the right and power of the Board to nullify and set aside settlement contracts of this type. The decision of this question will depend upon a sober evaluation of the conflicting public policies involved. It may be contended that an affiliated union, such as the CIO, fully and militantly represented and aware of the facts is nevertheless a ward of the court and must be protected against its own acts and agreements. On the other hand, the court may take the view that unions such as the CIO should be held to responsibility for their own agreements and that setting aside the same even in the interest of such a policy ignores a principle of fair dealing which transcends economic interest. The public is certainly interested in the prevention of strikes and their peaceful settlement. This is especially true of a strike for recognition, which should be an anachronism, under the ample provisions of the Act to determine the bargaining agent. But more than that, it is public policy that people keep their agreements. The adoption of the more paternalistic ruling would in effect say to the unions and the Board: "You may make and approve settlements of strike situations and if you lose you may repudiate your own recognition of the union and your own agreements and if you win you will be protected anyway."

This petitioner contends that the Board should not be vested with such power and that the peaceful settlement of difficult or doubtful strike situations will not be furthered by a such a policy; observance of contracts is the paramount policy and that if this policy is not followed the whole machinery for the protection of collective bargaining will be useless and futile.

Compromise settlement should be sustained. The Board suggests that the freedom of the collective bargaining

agent is a paramount policy. It is appropriate in this connection to call attention to two other paramount policies in the Act:

1. The purpose of the Act is to promote industrial peace and to prevent the interruption of interstate commerce by industrial strife. The long strike in this case which was conducted by the CIO union called for settlement. It was a hardship on the majority and the minority alike, and in addition it was a hardship on the company. The court should be reluctant to place unnecessary limitations or conditions upon the settlement of such strikes.

2. The purpose of the Act is to promote collective bargaining. It would be futile to encourage collective bargaining and at the same time to encourage the violation of the very contracts which are sought to be consummated through that method.

It is therefore appropriate to cite briefly some of the decisions of this court announcing well-settled rules which favor settlements of all kinds.

A compromise and settlement fairly made with the facts equally known by both parties is a final and conclusive adjustment of their controversy; where it is made between persons legally competent to contract and is supported and founded upon sufficient consideration, it has in certain respects the effect of a judgment between the parties. It operates as a merger of, and bars all right to recover on, the claim or right of action included therein and defenses thereto. The compromise agreement is substituted for the pre-existing claim or right, and the rights and liabilities of the parties are measured and limited by the terms of the agreement (11 Am. Jur. 272).

It was stated by this Court in **Chicago, Milwaukee & St. Paul R. R. Co. v. Hemen Clark**, 178 U. S. 353; 44 L. Ed. 1099, l. c. 1107:

"The general principle applicable to settlements was thus expressed by Mr. Justice Clifford in **Hager v. Thomson**, 1 Black 80, 93, 17 L. Ed. 41, 44:

> "'Much the largest number of controversies between business men are ultimately settled by the parties themselves; and when there is no unfairness and all the facts are equally known to both sides, an adjustment by them is final and conclusive. Oftentimes a party may be willing to yield something for the sake of a settlement; and if he does so with a full knowledge of the circumstances, he cannot affirm the settlement and afterwards maintain a suit for that which he voluntarily surrendered.'"

Mr. Justice Clifford, in the case of **Sweeny v. United States**, 17 Wall. 75, 21 L. Ed. 575, stated (l. c. 576):

> "Parties may adjust their own disputes, and when they do so voluntarily and understandingly, no appeal lies to the courts to review their mutual decision."

It will not be contended that the settlement of a strike, even if, pursuant to the rules of the Board, the withdrawal of charges of unfair practice are involved, is the same as settlement of the unfair practices. The Board, pursuant to the policy above mentioned, concluded that a fair election could be held notwithstanding the pending charges. It was advised of the settlement contract and participated in the arbitration of the matter of collective bargaining representative.

Nor will it be contended that absent fraud or concealment or over-reaching of some kind, settlement of a strike is contrary to public policy in the same class as the compounding of a felony.

In one case this court has upheld the settlement of statutory penalties collectible in a civil action.

In the case of **United States v. Chouteau**, 102 U. S. 603, 26 L. Ed. 246, Mr. Justice Field, in discussing a compromise between the Government of a penalty with a distiller, states (l. c. 249):

> "The question, therefore, is presented whether sureties on a distiller's bond shall be subjected to the penalty attached to the commission of an offense, when the principal has effected a full and complete compromise with the Government, under the sanction of an Act of Congress, of prosecutions based upon the same offense and designed to secure the same penalty.
>
> "Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term penalty involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. The compromise pleaded must operate for the protection of the distiller against subsequent proceedings as fully as a former conviction or acquittal. He has been punished in the amount paid upon the settlement for the offense with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offense. **To hold otherwise would be to sacrifice a great principle to the mere form of procedure and to render settlements with the Government delusive and useless.**"

This case has been cited with approval by this Court in the case of **United States v. La Franca**, 282 U. S. 568, 75 L. Ed. 551, l. c. 556.

The Board in this case approved and sanctioned the withdrawal of the charges, and as stated above, even required such withdrawal. To nullify such action is to render it futile.

Of course, if there is fraud or deceit practised in arriving at a settlement agreement it may be set aside. How-

ever, it is stated as a rule that compromise of a doubtful claim will not be set aside, except for fraudulent misrepresentation or concealment of facts or for such imposition as amounts to unfair or unconscientious dealings. Clearly in this case the facts were well known to all the parties, including the Board, and there was certainly no finding of fraud or duress.

It may be clearly stated that a compromise or settlement stands upon the same footing as other contracts. Either party may enforce it, or recover damages for its breach. In this case, if the petitioner did not comply with its obligation under the settlement agreement to enter into a closed shop contract with the Independent, it would have been guilty of a breach of contract.

The attitude of the courts to compromise and settlement agreements is well stated in 11 Amer. Juris. 249, wherein it is stated:

> "The law favors the amicable settlement of controversies and it is the duty of the courts rather to encourage than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. The nature or extent of the rights of each should not be too nicely scrutinized. Courts should and do, so far as they can do so legally and properly, support agreements which have for their object the amicable settlement of doubtful rights by parties; the consideration for such agreements is not only valuable but highly meritorious. Because they promote peace, voluntary settlements of differences between parties having legal capacity to contract in respect to their rights where all have the same knowledge or means of obtaining knowledge concerning the circumstances involving their rights, and where there are no fraud, misrepresentations, concealments, or other misleading incidents, must stand and be enforced if intended by the parties to be final, notwithstanding the settlement might not be that which the court would have decreed if the controversy had been brought before it for decision."

The situation in our case, involving as it does the settlement of a strike is quite different from the situation existing in such cases as **N. L. R. B. v. General Motors Corp.** (CCA 7th, 1940), 116 Fed. (2d) 306, or in **N. L. R. B. v. Reblon Products Corp.** (CCA 2nd, 1944), reported in 14 Labor Relations Reporter, page 710, where settlement of pending and future charges of unfair practice was the sole matter for consideration of the court. Furthermore, in those cases the Board was not advised of the settlements nor did it participate therein.

The present settlement agreement was read by and discussed with the Regional Director (R. 275, bottom of page) and, as above stated, the Board participated in the performance of the settlement. The Board had in fact sent its agents to investigate the pending charge. While the investigation of the charges of domination were, as claimed by the company, arbitrary and one-sided, it is apparent from the evidence on this investigation that it developed only substantially the same facts as were developed at the hearing where the entire settlement was re-opened and examined. See Wallace Corporation Exhibit 47 (R. 293-5, Ex. 924), reciting the circumstances of the conduct of this investigation and some of the allegations of the Board's agent.

The circumstances not only show that the settlement was open and above-board but the evidence shows that in this case the Board's decision comes very close to repudiation of the acts of its agents. Certainly the Board has approved the repudiation of this settlement by the C.I.O. union and the repudiation of its own agents' acts in participating therein.

II.

The Court Erred in Holding That There Was Substantial Evidence to Support the Board's Finding That the Company Discharged the Forty-three Employees Mentioned in the Order Because of Prior Union Activity or With Discriminatory Intent, More Especially Because All of the Evidence Is to the Contrary.

The complaint upon which the order of the Board is based alleged that the Company "discharged and refused to reinstate the following named employees **because they were members of the United and because they were not members of the Independent**" (R. 35). There is no evidence to support this charge.

The findings of the Board are worded in the same way (R. 24): "We further find that by discharging the forty-three named employees named in Appendix A because of their membership in and activities on behalf of the union and because they did not belong to the Independent, the respondent discriminated with respect to their hire and tenure of employment. * * *" There is no evidence to support this finding.

The court apparently hesitates to make such a finding simply stating that "pursuant to the contract, it discharged forty-three of the former employees who had taken part in the effort to organize the CIO union because they had not become members of the Independent, although it knew that thirty-one of these employees had applied for membership in the Independent and had been rejected" (R. 347). The latter statement is without foundation.

It is true, as the court states, that the forty-three employees were discharged because they had not become members of the Independent. It is not true as the court finds that the Company knew that thirty-one of the employees had applied for membership in the Independent.

The suggestion of the Company that the employees be accepted as members when it found out this fact is certainly no evidence that the Company wanted to discriminate, but quite the contrary. The attitude of the Company and what happened is fairly well set forth in Respondent's Exhibit 9 (R. 289, Tr. 574). The President of the Company wrote to Thompson that he was "very concerned" over the report. He appealed to the union to take back any of the employees who desired to become members of the union. He deplored the differences of opinion which prevented the people from working together.

The Company's attorney then attended a conference in Cincinnati with the Regional Director to try to induce the Independent to take the men back. Mr. Thompson testified that Mr. Wallace seemed sincerely anxious to see that these employees returned to work (R. 111). He was asked this question:

> "Q. Is it not true that your union—when I say your union, I mean the Independent union—has considered and presented to it various proposals to take these people into the union, those 30 or 40 people that were excluded? A. Yes.
>
> Q. And they have consistently refused to take them back? A. They have."

At the hearing itself counsel for the Company suggested a recess so that the Independent and the Board could get together to try and settle the problem, "the principal problem here of the return of these people to work." In that proposal counsel for the Company said in open court: "I suggest, in the interest of possibly disposing of this matter and with the assurance which I made before and now repeat, that the Company is ready to take any steps which are necessary to the end that these people be put to work, as it has been throughout since this agreement was entered into" (R. 68).

There is only one brief piece of evidence in the record that the excluded members were in fact members of the CIO (R. 152, where Dodrill stated he checked the cards after the lay-off). There is no evidence whatever that the Company itself desired to discriminate against CIO members, in fact the evidence is to the contrary. One of the witnesses for the Board and the CIO stated that the foreman White had tried to get him to join the Independent. "He said he hated to see me quit, or something like that" (R. 152). This witness did not even apply for membership in the Independent. During the strike White had called upon witness Green, a member of the CIO, and she attested to his fairness about the union matter as follows:

> "Q. Do you remember what Harry said, what he talked about? A. Well, Harry said he was getting tired of loafing and Minnie and I said we were too, but there was nothing we could do about it, we did not suppose, and Harry said: 'Well,' he said, 'I don't give a damn what union they belong to,' he said, 'I would like to see them get this thing settled and all of us get back to work'" (R. 193).

A number of CIO members were taken back by the Company without any question merely because they were members of the Independent. The witness Orville Smith was a CIO member and he testified that he was taken into the Independent along with seven others after the strike (R. 123).

The sole reason for the discharge by the Company, as appears from all the evidence, is the fact that the employees in question were not members of the Independent.

Petitioner's witnesses were entirely frank on this point: The Company and its officers always understood that a closed shop clause gave control of its own membership to a union and that if the union excluded employees of the Company they became ineligible to work at the plant.

On cross-examination by Mr. Ritchie, the Trial Examiner asked about this point (R. 266). He said to Mr. Ritchie:

> "Mr. Ritchie, the point I have in mind, and I will ask the question now, whether or not the Company considered that by the signing of the contract between the Company and the Independent, that the Independent was obligated to receive as members employees within the unit described; I want to know whether that was the Company's understanding of the contract or whether it was not?"

After some further colloquy of counsel, the witness (Christmas) said:

> "It was my understanding of this agreement that after the ten-day waiting period everyone working in the jobs specified here as being eligible to union membership would have to be members of the union."

Trial Examiner Spencer then asked some other questions which appeared to confuse the witness, and Mr. Ritchie took the witness (R. 267):

> "Q. I understood you to say, Mr. Christmas, that one of the objections that you had to the union shop provision was that it would give the organization the power to keep out men who were employees and who you might want to rehire? A. That is correct; yes, sir.
>
> Q. Well, in reaching that conclusion, was it your position or thought that the matter of taking in members was a matter solely in the hands of the union? A. That is correct; that is what I understood the contract to mean.
>
> Q. And that the union had the right to stop or exclude any persons whom they desired, had the right to accept or exclude any persons whom they desired to accept or exclude? A. That is what I understood."

It is equally clear from the testimony that the Company had no notion of the extent to which the Independent would go in excluding employees. As above stated, a notice of the contract, quoting its provisions, was posted. At several points in the examination, the president of the Company and Mr. Christmas, vice president, were asked what they knew about the intentions of the union to exclude employees. Mr. Christmas said that when they were negotiating the contract that they did not then learn from the Independent any specific employees that they had in mind to exclude. During the ten-day period between the date of the contract and the date of the layoff, Mr. Christmas conferred with the union representative at White Sulphur Springs with the purpose, in part, of talking about the closed shop clause. He says at that time he had no information as to how many employees might fail of election to the Independent (R. 256).

When Mr. Wallace was asked about the lay-off, he said (R. 278):

> "The first I knew of it, Mr. Phillips called me up in Cincinnati. That was my first knowledge of any man's layoff.
>
> Q. What did you say there? A. I told him I didn't believe it.
>
> Q. Did you confirm it? A. I did, and found it was true, and called him back and told him so.
>
> Q. And what effort did you then make in regard to them? A. Well, I asked you to go to Cincinnati and talk to Mr. Phillips about it. I called Mr. Thompson on long-distance phone, possibly wrote him a letter, asking him to reconsider.
>
> Q. Do you know whether that was after you received notice of a complaint having been lodged with the Labor Board or after? A. That was before."

Again (R. 281), Mr. Wallace was asked about it again:

> "Q. Was it your understanding at the time this contract was entered into that all the employees, if

they asked for membership in the union, would be given that permission? A. Frankly, sir, I never thought of it; it never occurred to me. I certainly did not expect them to refuse forty-two people.

Q. Well, did you expect them to refuse anybody? A. No; I did not. I thought once the election was held, and the union certified to, that our troubles were over, and it never entered my mind."

The Board's agents themselves considered that Thompson was responsible for the discrimination in this case. Thompson was called to the witness stand by the Board apparently under the erroneous impression that they did not thereby make him their own witness. Thompson relates at length the extraordinary efforts of agent McKay, by pressure on his employer, Woodyard, to get Thompson to use his influence to obtain membership for the excluded employees. Thompson quotes McKay as saying:

> "He then told Mr. Woodyard that unless you cause to be admitted into membership in the Richwood Clothespin and Dishworkers Union a certain group of former employees of the Wallace Corporation who had applied for membership in said union and been denied the same, that the Labor Board would file charges of company domination and unfair labor practices" (R. 106-7).

Woodyard was Thompson's employer and owner of the "Nicholas Republican." McKay, the agent for the Board, actually tried to get Woodyard to discharge or transfer Thompson from his job as editor (R. 108).

The charge in question was clearly a charge against Woodyard Publications, because McKay contended that Woodyard was an employer (R. 106). This question was asked of Thompson (R. 108):

> "Q. Do you mean to say that as a condition of withholding of this charge that he asked Mr. Woodyard

to discharge you from your job? A. Either to discharge or transfer me to some other location.

Q. That was in your presence? A. It was."

In point of fact Thompson was, pursuant to this theory, named as a respondent-employer in the Board's complaint (R. 1). The Trial Examiner granted a motion to dismiss as to the respondent Thompson (R. 4).

The petitioner submits that these desperate efforts of the Board's agent to influence Thompson constitute an admission by conduct that the Board knew that Thompson was the party responsible for the exclusion, and not the Company.

The petitioner submits that it is more than obvious from the record that the Company reluctantly dismissed these employees for the sole reason that they were not members of the Independent and therefore not eligible for employment under the closed shop contract. It is furthermore than obvious that the Company did not select the persons who were excluded. The Company admitted former CIO members who were admitted into the Union. The discrimination was the Independent's act and the only reason given by the Independent for the exclusion was the above-mentioned letter stating that the Independent intended to exclude employees who were hostile to the Independent.

The failure of the Board and the Court to distinguish between the employees who applied to the Independent for membership and the twelve employees who did not apply for membership shows again the unfairness of the Board's finding that the Company was party to the illegal discrimination. It cannot reasonably be held that even the Union itself excluded employees from membership who had never applied. The Company cannot be charged as party to an act which never took place. The twelve employees in question by their own act failed to qualify for

employment as members of the Independent. All of the authorities cited below agree that under a closed shop contract a union may require the discharge of employees who fail by their own act to join the union having the closed shop contract.

The whole finding of discrimination on the part of the Company is unsupported by the evidence. Discrimination involves a knowledge of the difference upon which the selection is based. The Company never had any knowledge upon which to select some CIO members for re-employment and others for disqualification. This discrimination was the act of the union. There is every reason to suppose that the union's discrimination was based, as it stated, upon the hostility of the excluded employees when they were excluded, and, as above stated, as to the twelve there is no evidence of discriminatory act on the part of anyone.

The situation which confronted the Board was clear. The Independent union had harshly caused the discharge of certain CIO members. Whether the act of the Independent was illegal or malicious or unreasonable, the law gave the Board no authority to proceed against the union or to penalize the union for its action. The Board therefore sought to charge the Company with the Union's act and to impute to the Company the motivation of the union. That the Board's agents were desperately looking for some remedy is amply demonstrated by the circumstance that they joined Thompson in the complaint. It is also a circumstance to support this theory that in its complaint it charged the Company with "defining qualifications for membership in the Independent so as to defeat the United". (R. 35). This charge also failed as, in fact, all the efforts of the Board to prove discrimination on the part of the Company likewise failed.

The Board was without authority to remedy this situation because the law gave them no such authority and, as

pointed out below, it is even doubtful whether the excluded employees had any remedy against the union under the existing state of the law. So they "find," a non-existent discrimination by the employer.

The facts show that the employees in question were laid off simply upon failure to produce evidence that they were members of the union, that the Company did not desire to do this and did everything it could to induce the union to reinstate them. There is no evidence that it knew either the reasons for exclusion; or whether they had been excluded or simply failed to apply for membership. The facts in this matter in the record are shown by a stipulation requested by the Board's counsel and inserted in the record at the trial of the case which stated the entire facts, **not as known to the Company at the time of the lay off** but as subsequently determined by the parties (R. 99). It was stipulated at the hearing that thirty one "applied for membership in said Richwood Clothespin and Dishworkers Union and their applications were voted upon by the members of said organization in the regular manner as provided by the constitution and by-laws of said organization, but said applications did not receive the required number of votes to permit them to become members therein." It was also stipulated that twelve of the forty-three employees "did not apply for membership in the said Richwood Clothespin and Dishworkers Union."

The Board and the Court fail wholly to make any distinction in this case between the employees who were thus excluded by the union and those who failed to apply for membership, thus charging the Company with discrimination which was not even practiced by the union, and charging it with knowledge which it never had and which was essential to the discrimination with which it is charged.

III.

Far From Being an Unfair Practice, the Decision of the Employer to Abide by Its Contract Was Correct in This Case for the Following Reasons:

(a) The employer in making the closed shop contract in this case did no more than it was obligated to do, and the contrary holding of the Court is in error.

The settlement agreement contained this provision (R. 55):

> "The company further agrees that if either union is proven to represent a majority of its employees by said vote, it will recognize a union shop, provided that the company shall at all times retain the right to suspend, hire or discharge any employee for proper and just cause."

(Parenthetically, no point has been made in this case that this agreement of the Company for a union shop is to be distinguished from an agreement for a closed shop. Mr. Wallace, President of the Company, used the term "union shop" to mean a shop where he could hire whom he pleased provided that they became members of the union, and "closed shop" to mean a clause where he had to go to the union for all employees (R. 276). The terms "union shop" and "closed shop" are interchangeable as recognized by the authorities. Jerome Toner in his book, "The Closed Shop" (Washington, D. C., 1942), page 27, says:

> "Today the union shop and the closed shop mean substantially the same thing."

In his notes to his section on the Closed Shop in "Cases on Labor Law" (St. Paul 1944), at page 67, Milton Handler defines the closed shop and the union shop as follows:

"Closed shop—only union members can be hired and workers must remain union members to retain employment.

"Union shop—Non-members may be hired but to retain employment must become union members after a certain period."

There is no doubt then that the contract made by the petitioner was within the terms of the National Labor Relations Act.)

Section 8 (3) of the National Labor Relations Act (29 U. S. C., Sec. 158) reads as follows:

"Sec. 158. Unfair labor practices by employer defined

"It shall be an unfair labor practice for an employer—

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in sections 151-166 of this title or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in sections 151-166 of this title as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 159 (a), of this title, in the appropriate collective bargaining unit covered by such agreement when made."

The contract which the employer actually made (R. pp. 61-66) provided:

"(E) The company agrees that all of its employees, other than office personnel, superintendents, managers, foremen, watchmen and any others assigned to supervisory duties, shall be members of the union in good standing. With respect to present employees of

> the company not now members of the union and likewise with respect to any person hereafter hired by the company, other than those above expressly excepted, all such persons shall become members of the union within ten days from the date of this agreement, as to present employees, or within ten days from the date of employment with respect to future employees, and the company, upon request of a duly authorized officer of the union designated for the purpose, shall require identification of any employee as a member of the union and proof of good standing.

The evidence is ample and uncontradicted that the company sought to avoid the latter clause in negotiating the contract of March 7th. Mr. Thompson testified that the Wallace Corporation opposed the closed shop clause in the negotiation of this contract. He said (R. p. 100):

> "Mr. Wallace very vigorously opposed it."

Mr. Christmas stated that one of the reasons why the first draft of the contract with the Independent was rejected was because it contained the closed shop clause (R. p. 263).

The court below states that counsel for the company "strongly advised against the closed shop contract," perhaps inferring that the company entered into the contract contrary to advice of counsel and on his opinion that it was illegal. Such is far from the case. Both the Company and counsel recognized the difficulties which would ensue from enforcement of the contract in the face of a rival union.

As a matter of fact the record shows that the Regional Director for the National Labor Relations Board came very close to advising the company to proceed with the closed shop contract. In a letter to the Regional Director of April 13, 1942, counsel for the petitioner reminded the Regional Director of a conversation (R. p. 301):

"You will remember that when I expressed considerable concern about the closed shop clause required by the union in their working contract, you made the remark over the telephone that probably I would have to agree to it as the CIO certainly would have insisted upon it if they had prevailed in the election."

The Real Reason for Compliance.

The fact of the matter is that the company finally complied with the settlement agreement and granted the closed shop contract because it feared otherwise another closing of the plant.

Mr. Davis, superintendent of the plant, was asked whether it was true that if the employees in question were put back to work the company would close the factory down (a question wholly unwarranted from the evidence). He said (R. p. 224):

"It was my honest opinion that if these 40 employees were ordered to be put back, the 240 that were working would be out of work. Yes, sir.

Q. Why? A. Why?

Q. Yes. A. Because they wouldn't work together.

Q. Oh, you mean that they would quit? A. Yes, sir.

Q. The rest of them would all quit if the 44 would be put back, that is what you mean? A. Yes, sir."

The only contention of the Board is that the company should not have made the contract, knowing of the hostilities between the two unions and the intention of the Independent to exclude unspecified employees from the union because of hostility and in order to preserve their majority. This hostility was no doubt the outcome of the bitter strike and may well have been based upon knowledge by the union of hostile acts or declarations of intention to undermine the union. The record does not show any details.

The quoted portion of the contract is an obligation of **the company** that all employees shall be union members. The court suggests that the company "should have seen that provisions were inserted that protected their rights." The union made no agreement whatever to admit all employees. The union had rights to a closed shop but surrendered no rights of control over membership. If an employee were not a member, the union could raise the issue and the employer was bound to discharge him.

This clause was not desired by the Company; it was insisted upon by the union. Both the company and the union understood that it gave the union control of membership with the right to exclude. Mr. Christmas so testified (R. p. 264). The union insisted upon it.

In the absence of any evidence of discrimination, it is clear that the reason for the discharge of these employees was the requirement of the contract and none other. As shown below, the law authorizes such a contract.

(b) **The employer was supported by two well settled principles of law, namely, that a union has exclusive control of admission to its own membership, and, second, that the National Labor Relations Act enjoins upon an employer absolute non-interference with respect to membership or non-membership in a union.**

Failure to comply with a closed shop contract with a certified union is an unfair practice.

It is not necessary to discuss the authorities holding that the courts themselves never interfere to dictate or supervise the admission policies of unions either at the behest of the excluded employee or the employer. The leading case is **Mayer et al. v. Journeymen Stone Cutters Assn.** (1890), 47 N. J. Eq. 519, 20 Atl. 492. This was a case of exclusion of "harvesters," that is, foreign immigrant labor. See also **Miller v. Ruehl**, infra; **Greenwood v. Building Trades Council of Sacramento** (App. Dist. Cal.

1925), 71 Cal. Appl. 159; **Shinsky v. Tracey**, infra; **Maguire v. Buckley**, 301 Mass. 355, 17 N. E. (2d) 170; **Murphy v. Higgins** (N. Y. Supreme Ct. 1939), 12 N. Y. S. (2d) 913, and other cases cited below.

Moreover, the National Labor Relations Act itself forbids an employer "to encourage or discourage membership in any labor organization" [Section 8 (3)]. This injunction upon the employer is contained as the major rule of conduct in the very section of the Act which permits closed shop contracts. The Act permits merely the "making" of agreements for a closed shop but does not otherwise limit the injunction upon the employer of non-interference with the rights granted by the Act. He is forbidden alike to encourage or discourage membership in any labor organization.

Failure to comply with a closed shop contract with a certified union is an "unfair practice."

It is notable in this connection that it has been many times held by the Board and similar boards that refusal of an employer to observe a closed shop contract which it has made is an unfair labor practice. For example, see **Carroll's Transfer Co.**, 14 Labor Relations Reports, Supplement of June 19, 1944, 56 NLRB, #168. See also **Shawsheen Dairy, Inc.** (1938), Mass. Labor Relations Comm. Case U. P. 241; **Modern Cleaners Co.** (1940), Wisc. E. R. B. Decision 129-A.

The rule has been applied in jurisdictional disputes. It is suggested by the Eighth Circuit Court of Appeals in **NLRB v. Gluek Brewing Co. et al.** (CCA 8th No. 12624, dated Aug. 7, 1944, reported in CCH Labor Law Service, Sec. 62314) that far from being obligated to protect minorities in a closed shop situation, the employer is obligated to support the closed shop union. In this case the brewing company had, as the court stated, been the "unwilling and unhappy battleground" of a jurisdictional dispute between the brewers and the teamsters. Under

pressure from the teamsters, it discontinued deliveries and made an independent contract with Bach Transfer & Storage Co. to handle its deliveries, the latter company using union teamsters for drivers. The Board found and the court confirmed that the action was an unfair labor practice in the face of the brewing company's closed shop contract with the Brewers Union. The court announced the doctrine with citation of many cases that the intent of the employer was not within the ambit of the power of the court to review, and said:

> "The fact situations in South Atlantic Steamship Co. v. NLRB (5th Cir.), 116 Fed. (2d) 480, and NLRB v. Star Publishing Co. (9th Cir.), 97 Fed. (2d) 465, are in important respects similar to this case. It may be said, also, that Gluek would have been justified, if not indeed obligated, to oppose Teamsters and to support Brewers because it had an unimpeachable closed shop contract with the latter. Act, Sec. 8 (3), Title 7, USCA 158 (3); International Assn. of Machinists v. NLRB, 311 U. S. 72, 81; Warehousemen's Union v. NLRB, 121 Fed. (2d) 84, 87; M & M Woodworking Co. v. NLRB (9th Cir.), 101 Fed. (2d) 938, 940."

See also M. & M. Woodworking Co. v. NLRB (CCA 9th, 1939), 101 Fed. (2d) 938.

IV.

On Existing Authorities Quaere Whether the Court Should Hold That It Is Unreasonable or Unlawful for a Union to Exclude From Its Membership Members of a Rival Union or Employees Otherwise Hostile.

The principal notice which the company had of the intention of the union to exclude is contained in a letter from Mr. Thompson on the letterhead of the "Nichols Republican," dated February 28, 1942, insisting upon the closed shop clause (R. p. 287). He had evidently dis-

cussed the matter with his counsel, Mr. Ritchie. The reason for the Independent's insistence upon the closed shop is stated clearly:

> "Therefore, if you continue to hire new employees who are favorable to the interests of our opponents, they will be in the majority before long and affiliation with our opponents would probably be their next step."

He refers, in addition to counsel Ritchie, to some "Research Institute Analysis" about the law:

> "* * * the closed shop will therefore give us some control in the hiring of additional employees who are unfavorable to our interests and who would further jeopordize (sic) our majority."

He also refers to present employees, including Harvey Dodrill (who is the only person named in the letter), "whom our members have declared by unanamous (sic) ballot that they will not work with, whose presence in the plant is unfavorable to our interests." At the end of the letter he says:

> "We must insist, however, upon a closed shop and we would generally appreciate it until it can be effected, if you will avoid taking on any additional employees whose sympathies are favorable to the interests of our opponents."

There was nothing in this letter to indicate any wholesale exclusion. In fact, Thompson specifically states the hope that the company "will not become convinced that our intentions are to become radically unreasonable."

There is no doubt whatever from this letter that the union was trying to protect its majority and protect its union.

It is notable that the union did not exclude all sympathizers with the CIO. There is no evidence of how many members they had, except the report of the election in

which 87 votes were cast for the CIO against 98 for the Independent (R. p. 60). It appears obvious that many members of the CIO were taken into the Independent. There is specific evidence in the record that many former CIO members were taken into the Independent. Orville Smith testified that he was a former CIO member and that seven others were taken in with him after the strike and continued in employment (R. p. 125). The witness Green was a member of the CIO (R. p. 122), and was continued in employment. This subject is discussed more in detail under Point II above, demonstrating that there was no evidence of company discrimination. The company had no knowledge on which to base any discrimination.

It is notable, also, that the company, after the strike settlement agreement, re-employed all employees regardless of membership.

Was the position of the Independent union under these circumstances unreasonable to such an extent, or so clearly illegal, that the employer should have refused to make the closed shop contract?

There are not many clear cases on this question. Employees do not often litigate for the sake of getting a job. However, the weight of authority indicates that a union may legally exclude from membership persons whom it believes hostile to the union. The employer should not have to decide such a question. Prima facie he was amply warranted in keeping his hands off. In view of the charges in this case, however, it is of importance to show that the authorities hold that the union is absolute in this field and may exclude for reasons of hostility.

While, as pointed out above, it is the almost universal rule of the courts that they will not interfere to require a union to admit nonmembers, regardless of the reason for exclusion, it is perhaps worthy of note that a number of cases have come to the courts where members sought

admission and had been excluded for the sole or controlling reason that they had been hostile to the defendant union.

Acierno v. North Shore Bus Co., Inc., and **Amalgamated Assn. of Street Ry. etc. Employees** (Sup. Ct. of Kings County 1939), 17 N. Y. Sup. (2nd) 170, 173 Misc. 79: The plaintiff sued for injunctive relief to be admitted to the American Federation of Labor union, which had a closed shop contract with the North Shore Bus Co. The plaintiffs had formerly been employed by the Bee Line, Inc., which formerly operated the bus line, but it had labor trouble and it was alleged the plaintiffs had been strike breakers in this labor trouble. The Bee Line franchise was taken over by the defendant bus company and the new bus company had agreed with the City in taking the new franchise that it would hire employees of the company which formerly operated the route. The plaintiffs were refused membership on the principal ground that they had been strike breakers. The defendants asserted: "It would not be consistent with the efficient operation of the busses of the company to hire these strike breakers," and the court said:

> "Under the present state of the Law, the court cannot compel a union to accept anyone for membership, irrespective of the cause for refusal and even though such refusal may be arbitrary." Citing Miller v. Ruehl, cited below.

In **Shein v. Rose** (Supreme Court, New York County, 1939), 12 N. Y. S. (2d) 87, an excluded member who had a work permit sought by injunction to be admitted to the Millinery Workers Union No. 24 in New York City. It appeared that the plaintiff had been a member of a sister local in Chicago, had been awarded a scholarship to the Brookwood Labor College at Katona by this local and upon return to Chicago had joined the Needle Trade

Workers Industrial Union. "This latter organization was maintaining open warfare in direct competition with the local which sent her to college." The plaintiff had been excluded from membership. There was some contention that the Industrial Union was communistic or controlled from Russia, but the court said:

> "More significantly is the undisputed fact that this organization was engaged in direct activities which, if successful would strike down and eliminate the defendant local and remove it from existence in the labor field here."

The court held that the union was justified in a cautious policy, that the antagonistic attitude of the plaintiff was apparent, and relied upon the general principle that the membership was a privilege and not a right. The defendant could have refused membership, limited or unlimited, and such refusal could not have been reviewed by the courts.

One of the leading cases on this point is **Shinsky v. O'Neil** (1918), 232 Mass. 99, 121 N. E. 790, which should be read in connection with a preceding case by the same plaintiff, entitled **Shinsky v. Tracey** (1917), 226 Mass. 21, 114 N. E. 957. The case should also be compared with Fairbanks v. McDonald (1914), 219 Mass. 291, 106 N. E. 1000, digested infra, which holds that even if a union exclusion is wrongful, the employer should not be held liable. In the earlier case the plaintiff, a shoe worker who had been a member of the United Shoe Workers Union, but **had been expelled** for joining a rival organization, sought damages and an injunction against officers of the union when he was discharged by an employer under a contract between the union and the employer, called a "peace pact," which required the employer to employ union members only, so long as the union was able to furnish workers. The closed shop contract was urged in defense

in this case, but was disregarded as a defense because the Master and the lower court had found that the dominant purpose of the union was "to punish him and hold him up as an example before their membership." The court held that "the defendants were not seeking the protection of the contract for the economic purpose of furnishing work for their own members," but that the action was "malevolent." The case therefore turns upon the finding of malice by the court below. The court awarded damages, but denied an injunction for the reason that it considered such relief would be ineffective.

Subsequently the same employee filed another suit, **Shinsky v. O'Neil**, supra. He had applied for work at two different places and had been refused work, and at the third had been employed but discharged upon representations of the union. Two of the employers in this case were subscribers to the same "peace pact" mentioned in the first case and the third had a plain closed shop agreement.

In this case the closed shop agreement was definitely in issue as a defense. The court below had found, and no objection was made to this finding, that the exclusion by the union was pursuant to its general policy "to secure all work possible for their members rather than to have it go to unaffiliated workers," and also to "secure an increase in number of what are sometimes called closed shops," one of the purposes of this policy being to "enlarge and strengthen the union organization." The contention was that this purpose took the case out of the general decisions sustaining closed shop contracts, but the court said it was not able to accede to this contention of the plaintiff and continued:

> "Workmen cannot hope to succeed in securing advantages of bargaining for the common benefit unless their combination, their organization, their union (call it what you please) is a large and strong one. If any member of the combination or union were to

testify that he did not wish, 'to enlarge and strengthen the union organization,' no one would believe him. No one would believe that a member of a labor union organized to secure the advantages of bargaining for the common benefit could hope to succeed unless all the members of the union did their best 'to enlarge and strengthen the union organization.' So far as this finding of the Master is concerned, we are of the opinion that the policy of the United Shoe Workers of America 'to enlarge and strengthen the union organization' is an incident and a necessary incident to a successful combination to secure the advantages of bargaining for the union benefit. What we have said with respect to this finding of the Master is also true of the other findings relied on by the plaintiff, namely, 'a part of the policy of the union is to secure an increase in number, what are sometimes called closed shops.'"

It is of interest to note in this case two circumstances: (1) that the plaintiff in Shinsky v. Tracey had sought an order of the court requiring the union to admit him after his expulsion, and the court held, on familiar principles, that he had no remedy in court for such reinstatement. (2) It is also interesting to note that the Master in Shinsky v. O'Neill had found as follows:

"The last finding of the Master which is relied on by the plaintiff to take this case out of Hoban v. Dempsey, and the doctrine of Pickett v. Walsh, is this: 'I find that, as a consequence of the case, Shinsky v. Tracey, 226 Mass. 21, and the proceedings leading up to that suit, the defendants, other than Daly and Hedlund (employer's representatives) and the union generally were and are in a state of hostility to the plaintiff.' It is plain from the Master's finding which follows immediately after this finding that he did not intend by this finding to state that the refusal to employ the plaintiff was based on 'hostility to plaintiff.' Immediately after this finding the Master

made the following finding: 'But I do not find that, in the three incidents related in this report, the defendants or the union did anything adverse to the plaintiff that they would not have done had the plaintiff been a non-member of the union against whom no such hostility existed.' Whether the plaintiff could have obtained admission into the union as an ordinary member could, must be a matter of conjecture because he made no application for admission."

No exceptions were taken to Master's report.

The last statement of the Master is difficult to understand in view of the fact which was in the record of this case and was stated by the court as a fact in the beginning of the opinion that the plaintiff had been actually expelled from the union and had sought in the court below a decree of court ordering the union to readmit him. The distinction which the court is evidently trying to make is that the hostility which existed was a hostility due to the status of the plaintiff rather than to any personal considerations or personal ill will.

The court in Shinsky v. O'Neill denied the application for an injunction. The court pointed out that the defendants had done nothing more than to insist upon the enforcement of agreements.

There was an interesting contention by the plaintiff in Shinsky v. O'Neill that it was not the custom of the union to refuse membership to workmen wishing to join the union, and he advanced this policy as a further indication of illegal purpose or of malice and ill will against him—that in the policy of the union "It is not the work, but the man and the closed shop which the union really seeks in order to enlarge and strengthen the union organization." The court then remarks that the union would "open itself to serious criticism if it refused to admit to membership men qualified to perform the work

done by members of the union in question. By having as a part of its policy the custom of not refusing membership to workmen who wish to join such a union avoids subjecting itself to this criticism. We are of opinion that the finding of a Master here relied upon cannot be taken to mean anything more than this."

This dictum is sometimes quoted as indicating that exclusion of the kind indicated would be illegal. The question, however, was one of motive. The case is one where the plaintiff had been expelled from the union, which is stronger than the case of an employee non-member desiring to enter for the first time.

One of the leading cases in New York frequently cited is **Miller v. Ruehl** (Supreme Ct. Erie County 1938), 166 Misc. 479, 2 N. Y. S. (2d) 394. The case again turns on the general rule that the courts will not interfere in the membership of voluntary associations. The dicta in the case are, however, worthy of quotation, because the court realized the hardship involved in the exclusionary policy and in its holding that the union has the right to exclude from membership anyone it desires, regardless of reason. The following quotation from the case is worthy of repetition in showing that the court recognized the danger of compelling a union to accept members where such persons might be inimical to the union or destroy the union if admitted. It is also notable that the court in this case says that it is for the legislature to remedy the situation, and not for the court. The court held as a matter of law that the union has a right to reject from membership anyone it desires.

> "Legislation has led to efforts of large aggregations of labor unions to secure control of employment in certain industries, and there have been tremendous campaigns conducted for the inclusion of persons in one set of unions or another. So to the ordinary man it may appear somewhat odd that a person who ap-

parently is qualified under the rules of union to become a member is rejected by the union solely on the ground that the union does not care to have him as a member.' No provision of statute has been enacted to require a union to take into its membership any person who petitions for membership if such union does not desire that person as a member. But the petitioner contends that the legislation recently enacted must necessarily carry with it as a corollary rule of law the right of a laboring man to be admitted to membership in a union of his choosing."

"Before these recent efforts to unionize industry had governmental sanction in the manner in which sanction is expressed today, there had been efforts made on the part of individuals to force themselves into membership of unions and the courts have held in such cases that a union could not be compelled to accept an application for membership unless the union so desired. The basis of such holding has been that, if the union which was a voluntary association organized for the good of those in industry who would be eligible to membership could be compelled to accept members, the persons whose interests were inimical to the union and its purposes could force themselves into membership in the union and from within destroy the union and thus stultify the purpose for which the union was organized. Simmons v. Berry, 240 App. Div. 90, 205 N. Y. S. 442; Id., 211 App. Div. 704, 208 N. Y. S. 204, reversed 240 N. Y. 463, 148 N. E. 636; Greenwood v. Building Trades Council of Sacramento et al., 71 Cal. App. 159, 233 Pac. 823; Harris v. Thomas, Tex. Civ. App., 217 S. W. 1068; Mayer et al. v. Journeymen Stone Cutters Assn. et al., 47 N. J. Eq. 519, 20 Atl. 492."

"As the legislature has not enacted a specific statute compelling unions to accept members, this court is of the opinion that a labor union which is a voluntary association still has the right to reject applicants for membership at will. In view of this holding, one might ask what is to become of the applicant if he is

true in his statement of fact that he will be unable to obtain employment at his chosen vocation because he is not a member of the union. This is a question involving public policy and must be answered by the legislature. In enacting legislation to strengthen the cause of labor through unions the legislature has not made provision to compel unions to accept members. Its failure to do so must be accepted as the present expression of public policy and, therefore, an endorsement of the view expressed in the cases above cited that an applicant for membership cannot force his way into the union against the negative vote of the union."

New Jersey cases. New Jersey has furnished a number of precedents, notably the leading case of Mayer v. Journeymen Stonecutters, supra, holding that the courts will not undertake to require a union to admit members, such admission not being a right in any case, and also **Cameron v. International Alliance of Theatrical Stage Employees** (1935), 118 N. J. Eq. 11, where a union having a practical monopoly was enjoined from enforcing against its "junior" members an unfair and discriminatory by-law. The case is not inconsistent with the rule on exclusion of non-members, but is one of those cases where the by-law in the presence of monopoly was held in restraint of trade as against existing members.

The later case of **Wilson v. Newspaper & Mail Deliverers Union** (1938), 123 N. J. Eq. 347, 197 Atl. 720, was a closed shop case where the plaintiff was excluded by the union because "the books of the union were closed to new membership by reason of the fact that many members of the union were unemployed." The court found a monopoly and enjoined the union from interfering with plaintiff's employment. The Chancellor said:

"Everyone must be left free to pursue his lawful calling; that is fundamental. It seems to me neces-

sarily to follow that the union must either surrender its monopoly or else admit to membership all qualified persons who desire to carry on the trade of magazine mailers.

"A union may restrict its membership at pleasure; it may under certain conditions lawfully contract with employers that all work shall be given to its members. But it cannot do both."

The case falls short of holding that a closed shop with a closed union is invalid because of the element of monopoly, which was formerly held in New Jersey to invalidate a closed shop contract. The doctrine has been abandoned in most jurisdictions, as shown below under Point V (6). More particularly, the doctrine has been abandoned in New Jersey in the case of **East v. United Oystermen's Union** (1941), 130 N. J. Eq. 292, 21 Atl. (2) 799, discussed infra. Unfortunately, the latter case does not refer to the Wilson case.

A recent case not contested on the point here involved, also indicates an assumption that New Jersey courts hold that a closed shop contract is valid and permits exclusion of hostile employees from the union.

We refer to the holding of the Chancellor mentioned in **Hudson Bus Transp. Drivers v. Hill Bus Co.** (1937), 121 N. J. Eq. 582, 191 Atl. 763. It appears from the report of this case, which turns on a procedural point, that the bus drivers association sued for specific performance of a contract requiring the defendant company to employ only members of the complainant in the operation of its busses. Pursuant to the contract, the complainant association furnished drivers, but later some of the drivers joined another union, whereupon the complainant expelled the drivers and demanded that defendant bus company discharge the expelled drivers. The bus company did discharge them but reinstated them at a later date. The decree was granted and upon appeal no exceptions were

taken. (The expelled drivers sought to intervene and were admitted as parties below and counterclaimed against the association for wrongful expulsion and against the bus company for wrongful discharge. While the Trial Chancellor had held the complainant was entitled to specific performance of the closed shop contract, he had at the same time ruled that intervenors were not entitled to contest the rights of the union, suggesting a separate suit was necessary. The appeal was from this specific ruling.)

The Pennsylvania cases require some comment. In the Superior Court case of **Dorrington v. Manning** (1939), 135 Pa. Superior Ct. 194, 4 Atl. (2d) 886, plaintiffs had sued officers of a union for injunction against interference with their employment. It appeared that the plaintiffs had been members of a rival independent union called the Wyoming Valley Drivers & Trackers Assn., and while refusing at first to join the new union which had secured a closed shop, all applied just within the time limit and were excluded, because, although they received a majority vote for admission, they lacked the three-fourths vote required. (There was a contention in the case that the employer in the new union had agreed that all existing employees should be kept in employment and the trial court had so held, but the Appellate Court places no reliance on this circumstance.) The Appellate Court found, without mentioning the rival union, that the union had excluded the defendants "with no apparent lawful purpose" and that this constituted a malicious and unlawful interference with plaintiffs' employment and injunction and damages were awarded. The case can be classified with Shinsky v. Tracey, supra, on account of this finding of malice.

V (a).

Even If the Exclusion From Membership in the Union Were Unreasonable, the Act in This Case Is the Act of the Union and Not That of the Employer, for There Is No Evidence of Discriminatory Intent on the Part of the Employer.

The discussion of the evidence on this point is covered under Point II above. The petitioner desires to emphasize, whatever the disavowals of the Board may be, that this case centering on the word "discrimination" necessarily involves a diligent examination of motives. The evidence shows beyond question that the Board by confused thinking has imputed to this employer the motives of the union and the attitudes of its leader Thompson. The evidence shows without dispute that the employer opposed the closed shop in the original settlement agreement, that it was reluctant in the face of trouble ahead to comply with its settlement contract and to grant the closed shop; and that it not only deplored the exclusions in this case, but lent every effort to secure the reinstatement of the excluded employees.

It is manifest further that the employer had insufficient information upon which to base any such discrimination as that which is charged. It is manifest also that both the Board and the Court wholly fail to give this question any careful consideration, inasmuch as they held the employer liable for discrimination against employees who never applied for membership in the union.

V (b).

Absent Conspiracy as in This Case, or Any Evidence of Malice, the Cases Hold an Employer Exempt From Liability for the Exclusion of Members by a Union Due to a Factional Conflict or Otherwise, Even When the Exclusion Is Wrongful.

The court below in its opinion says:

> "It would not be fair to the company to say that it conspired with the Independent union to bring about the discharge of troublesome members of the opposite union" (R. p. 350).

In case it should be thought that the court was being over-generous in this concession to the employer, it should be stated that the Board disowned any charge of conspiracy. In its brief before the Circuit Court of Appeals for the Fourth Circuit the Board's counsel says:

> "In refuting at length the alleged charge before the Board that the company conspired with the Independent in a scheme to discharge the 43 employees, the company is again demolishing a straw man. The Board made no such charge or finding" (Brief before U. S. Cir. Ct. of App., pp. 33, 34).

In view of the full consideration which the Massachusetts courts have given to this problem, the case of **Fairbanks v. McDonald** (1914), 219 Mass. 291, 106 N. E. 1001, is worthy of note. In this case one union sued a rival union and the employer's superintendent for an injunction from unlawful interference with employment of members of plaintiff union. The contract with the union provided that no person who for good reasons was objectionable to the local should be employed in the cutting room. The factory was shut down for four days so that members of the one union would have a chance to join the other. Two of the plaintiffs made an effort to join the prevailing local, but

were prevented by reason of the $100 initiation fee demanded. The fee was imposed for the purpose of punishing these men for their persistence in not becoming members of Local 62. One of the plaintiffs never made an effort to join the local. It appeared that the excluded employees would have been employed by the superintendent but for his desire to end the strike.

Injunction was granted against the officials of the union because the court found that the purpose of the union in demanding the closed shop contract was to exclude the plaintiffs from employment, not to strengthen the union or obtain work for the members. The court held that in contemplation of law this was malice.

The significant part of the case is that the bill was dismissed as to the defendant superintendent of the company, although injunction and damages were assessed against the union.

A number of other cases have reached the courts where unreasonable and oppressive exclusions and discriminations are made by unions and in these cases the courts have refused to hold the employer responsible, and properly so. Foremost among unreasonable exclusions are racial exclusions. In **Blakeney et al. v. California Shipbuilding Corp. et al.** (Cal. Superior Ct., Los Angeles County, 1944), reported in 14 Labor Relations Reporter 796, six negro employees on behalf of themselves and 5000 other negro workers brought suit against the Shipbuilding corporations and the International Brotherhood of Boilermakers, etc. The company had a closed shop. The plaintiffs were in an auxiliary formed solely on the basis of color. The negro members were given employment only after all other members of the Local were employed. The plaintiffs asked for an injunction restraining the Brotherhood and, what is more important here, restraining the employers from discharging or refusing to employ the plaintiffs for lack of clearance or standing in the auxiliary.

The International Union was not before the court. The four corporate employers demurred. The court refused to rule on the case as to the International but sustained the demurrers of the employers, **without leave to amend**, for the following reasons: (a) the employers were not alleged to have had any part in the adoption of the by-laws of the Brotherhood; (b) they had no part in the affairs of the unions; (c) they were required by their contract to employ only those persons in good standing and who had a clearance card from the union; (d) there was no allegation of conspiracy; (e) the employers had no choice under the contract; (f) in entering into the contract the employers did nothing illegal.

In this case the court declined to do what the Fourth Circuit Court of Appeals has done in the instant case and said:

> "A decree ordering the employers to hire workers without union clearance would cut the heart out of a valid contract. The court is without authority to write a new contract for the parties governing a lawful subject matter."

The court reiterated the doctrine that membership in a union is not a right and that the court had no power to compel a labor organization to admit members.

The court also called attention to the fact that the remedy was legislative:

> "The legislature, not having adopted a statute requiring labor unions to admit to membership all who may apply, they are still voluntary associations and may reject applicants for membership at will. The fact that one may suffer injury by reason of non-admission to membership affords no ground upon which the court may decree admission."

As to the employers, the court said:

> "The demurrers of California Shipbuilding Corp., Consolidated Steel Corp., Ltd., Western Pump & Steel Co. of California, and Standard Shipbuilding Corp., are sustained without leave to amend, and plaintiff's application for a preliminary injunction against said defendants is denied."

The same view was taken by the Supreme Court of Alabama in **Steele v. L. & N. Rwy. Co.** (1944), 16 Sou. (2d) 416, a case which is now before this court upon certiorari. The court properly said as to the position of the railroad:

> "Considering, therefore, the situation as thus presented to the railroad, the question at once occurs to the practical mind: What step was the railroad to take? The representative of the craft, the Brotherhood, had made a request for modification of the existing contract concerning seniority rights. Was it the duty of the road to combat the representative and enter into an argument as to its resultant effect upon employees who were in the minority? No such duty is found."

In a number of cases where unions have **wrongfully** excluded employees from membership, the employer has nevertheless been held exempt from liability or penalty. In **Loney et al. v. Wilson Storage & Transfer Co. et al.** (C. C. A. Minnehaha County, S. D. 1944), 14 Labor Relations Reporter 745, the union was enjoined from disciplining members who deserted a strike and enjoined the employer from refusing them employment on the ground that the exclusion or discipline was illegal, but the employer was excused from any liability.

> "The plaintiffs are entitled to recover their costs and disbursements from all the defendants other than Wilson Storage & Transfer Co. * * *."

In **Armant v. Cannon Employees Assn.** (Superior Ct. Los Angeles County 1942), 11 Labor Relations Reference Manual 752, an employee had been wrongfully expelled by the union and discharged by the employer. The union by-laws, strangely enough, provided for judicial review of such procedure. The court held the employee was wrongfully expelled but that the plaintiff was entitled to no relief against the employer, and said (p. 757):

> "Under the evidence herein plaintiff is entitled to no relief in this action against the Cannon Manufacturing Corp. or James H. Cannon by reason of his discharge from their joint employment."

Extraordinary situations arise when there is a change of affiliation in unions by employees of an employer having a closed shop contract. One of the leading cases is **M. & M. Woodworking Co. v. N. L. R. B.** (C. C. A. 9th 1939), 101 Fed. (2d) 938. There was a closed shop contract in this case which, incidentally, required the company to discharge a new employee "if such person is found unsuitable for union membership," and the company agreed to release such persons from employment. The closed shop contract was with an A. F. of L. affiliate and when the CIO secured a majority in the plant the A. F. of L. threatened a boycott. After many difficulties the company reopened with only 50 employees, members of the A. F. of L. union, out of several hundred, and refused to employ the CIO members because they were not in good standing in the A. F. of L. The Board held this was an unfair labor practice, but the Circuit Court of Appeals set aside the order. It is notable that in this case even the Board felt that no penalty was in order because the company thought it was bound by its closed shop contract. The court above set aside the order in its entirety because the employer was simply abiding by his contract. The court had this to say:

"While the agreement was in force—from May 3, 1937, to March 1, 1938—the company complied with it. In that way and to that extent only it discriminated in favor of those who were, and against those who were not, members of Local 2531. If thereby it encouraged membership in Local 2531 or discouraged membership in Local 102, such encouragement or discouragement did not constitute an unfair labor practice within the meaning of Section 8 (3) of the Act."

See, also, **N. L. R. B. v. Gluek Brewing Co. et al.** (C. C. A. 8th, August 7, 1944), 8 Labor Cases, Section 62314.

The Board itself, in **Ansley Radio Corp.** and **Local 1221 United Electrical and Radio Workers of America, CIO**, 18 N. L. R. B. 1023, has held that an employer may not be held guilty of unfair labor practice where he discharges employees under a closed shop contract with the A. F. of L. union, who affiliated with a CIO competing union. It happened that these excluded employees constituted a majority of the employees in the contracting union and it was contended that the majority rule took precedence over the closed shop contract. The employees in question had not in fact been expelled from the A. F. of L. union, but the court held that the facts indicated their withdrawal. The case was further complicated by a prior unfair practice by the employer.

The Board held that the prior unfair practice which was found did not invalidate the contract.

"Where an unfair labor practice, constituting assistance to the contracting labor organization is engaged in after the making of a valid closed shop agreement, the act does not require that the contract be voided if such assistance did not materially affect employees in self-organization or collective bargaining beyond the restraint necessarily inherent in the operation of the contract itself."

This holding of the Board would indicate that in the present case the subsequent discharge should not affect the validity of the closed shop contract in any case.

The Board also held that the majority rule of the Act must be disregarded in the face of the closed shop clause and exonerated the employer from responsibility. The comment of the Board on the closed shop clause is worthy of quotation, l. c. 1059:

> "The freedom guaranteed employees under the Act to form, join, and assist labor organizations and to bargain collectively through representatives of their own choosing, without economic or other compulsion by the employer, is qualified by the proviso clause of Section 8 (3). The legislative history of this clause, as well as its language, shows that its purpose was to leave undisturbed by the Act, except in two instances, a form of industrial relationship which had won increasing acceptance by employers and had found widening approval in the law of the several states. The legislative intent and policy were to withhold what rights individual employees otherwise might have had under the Act but for the proviso in order to permit organized labor to seek and enter into this relationship where the employer was willing to do so and local law offered no obstacle.
>
> "Although the employees who withdrew from the Brotherhood were a majority of the employees in the unit and had designated another labor organization as their collective bargaining representative, it cannot be said that by virtue thereof the immunity accorded the respondent by the proviso clause ceased under the Act and, in consequence, the respondent's refusal to reinstate was violative of the statute. If the Congress had intended to limit in this manner a relationship which it sanctioned under the Act and to impose a responsibility upon the employer for failure to recognize the limitation, certainly such limitation would have been express. There is no express limitation in the Act that the proviso is applicable only so long as the contracting union maintains its majority. The

proviso clause declares that 'nothing in this Act' shall preclude an employer from 'making' a closed-shop agreement with a labor organization 'if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.' Although the proviso relates specifically only to the making of the agreement, the necessary implication is that the employer is protected against a charge of discrimination under Section 8 (3) in carrying out the closed-shop agreement as made, at least where, as here, the agreement is for a reasonable period of time."

An analogous Federal case. In **N. L. R. B. v. Lion Shoe Co.** (CCA 1st, 1938), 97 Fed. (2d) 448, a situation is recounted which is closely analogous to the situation in the instant case. The defendant company had had trouble with the United Shoe and Leather Workers Union which was so acute that the company decided to move its plant from Lynn, Mass., to another city unless a new contract could be made. The plant closed down and the move was announced.

Following this a meeting of old employees was held and a second meeting held at the plant of the company on the following day. As in our case, the Chamber of Commerce was interested and sent a representative to speak to the employees at the factory. A representative of the company also spoke. The employees decided to employ counsel and eventually organized a new independent union called the Lynn Shoe Workers Union. Counsel for the company was present at some of the organization meetings.

The company then made a closed shop contract with the new union and was thereupon charged not only with domination of the new union but also with discrimination because the company required membership in the Lynn Shoe Workers Union as a condition of employment. The case does not show how many of the members of the old union

were excluded by the new union, but it is apparent that from the picketing in the case and otherwise that a considerable number were excluded, either because they refused to join or because they were not admitted.

The court refused to find substantial evidence of unfair practice and held flatly that Section 8 (3) of the Act authorized the making of the closed shop contract. The order of the Board was vacated in its entirety, including the penalties imposed.

As shown under Point III (b) above, the employer in this case is not only warranted in enforcing the closed shop contract here, but if he had not done so he would have been guilty, under the authorities, of an unfair labor practice.

VI.

The Court Erred in Holding That the Closed Shop Proviso of the National Labor Relations Act, Section 8 (3), Authorizing Contracts Which Required Membership in a Union as a Condition of Employment, Also Requires a Union Holding Such Contract to Admit All Employees of the Employer to Membership and Is Not Binding on the Employer if He Is Upon Notice That the Union Excludes Any Employee on the Ground of Hostility of Such Employees to the Union.

(1) The legislative history of the Act shows that it was the intention of Congress in Section 8 (3) of the National Labor Relations Act to accept the status quo as to closed shop contracts and without extending the legality thereof under state law to authorize employers and unions to make such contracts with all the accepted features thereof.

The Circuit Court of Appeals has attempted to construe the closed shop proviso in what it calls "the light of the

* For this section of the brief we desire to acknowledge the able assistance of Mr. Ralph E. Kennedy, a student at Washington University Law School, St. Louis.

general purpose of the statute." It is the purpose of the following discussion of the legislative history of the Act to demonstrate that the closed shop proviso was an exception to the general policy of the Act in respect to two of such policies, as follows: (1) The Act adopts "majority rule" and contemplates that ordinarily the majority shall represent the minority. It is not consistent with this policy to permit a closed shop contract which even under the best conditions means that a majority may and frequently does exclude the minority unless they join with the majority and contribute to its support. Exclusion of a minority group can under no conceivable circumstances be considered representation. (2) It is the general policy of the Act, to which only the "making" of the closed shop is an exception, that an employer may not interfere with union activities or discriminate between employees on account of union membership.

It is manifest from the wording of the statute as well as from the legislative history that the closed shop was an exception to the policy of majority rule. It permits an employer, by agreement with a union, to entirely exclude nonmembers of the union from employment.

It will be apparent from the discussion which follows that Senator Wagner, the author of this statute, realized the dilemma in which the legislature was placed by the insistence upon the closed shop. There was a question in the minds of the labor union advocates of the measure as to whether similar provisions of the National Industrial Recovery Act, in prohibiting all employer interference, had not outlawed the closed shop. The proviso of Section 8(a) of the N. I. R. A. was manifestly adopted to remove any doubt about the legality of the closed shop.

The closed shop was not advocated nor embraced by Senator Wagner. He stated frankly that he "held no brief" for the closed shop. He stated he was simply adopting the status quo.

Legislative Reports and Discussion of the Closed Shop Clause.

The fact that Congress recognized that it was making an exception to "majority rule" when it legalized the closed shop, is amply demonstrated by the committee reports. Senate Report 573 of the Committee on Education and Labor, 74th Congress, First Session, page 13 (Serial No. 9879), contained the following:

> "* * * But majority rule, it must be noted, does not imply that an employee can be required to join a union, **except through the traditional method of a closed-shop agreement** made with the assent of the employer. And since **in the absence of such an agreement** the bill specifically prevents discrimination against any one either belonging or not belonging to a union, the representatives selected by the majority will be quite powerless to make agreements more favorable to the majority than to the minority." (Emphasis ours.)

See also House Report 1147, 74th Congress, First Session, pages 21-22.

Not only did Congress know what it was doing, but apparently from the hearings, the present Chairman of the National Labor Relations Board, Dr. H. A. Millis, also knew exactly what it was doing. In the hearings before the 74th Congress, First Session, Senate Committee on Education and Labor (Senate Report No. 81958, at page 180),* appears the following statement by Dr. Millis:

> "I approve of the proviso contained in (3). In spite of the contentions of many persons that Section 7 (a) of the National Industrial Recovery Act outlawed the union closed shop, I am convinced that this was not the intent of Congress. The object of the proviso is merely to permit, so far as Federal law is concerned,

* This is an unbound publication. Reference symbol Y 4. Ed 8/ N 21

employers and unions by mutual agreement to provide for the employment of union men only where a majority of the employees in the collective bargaining unit are already union members."

Many other witnesses who appeared, and whose testimony appears in the same report (No. S-1958), insisted upon this interpretation. For example, E. G. Poole, Vice President of the Carpenter Steel Co., Reading, Pennsylvania, page 374:

> "The bill provides that the majority may negotiate a closed shop agreement with the employer. If such an agreement were negotiated, all the employees would be forced to join the labor organization of the majority or lose their jobs. In plainer words, it legalizes closed-shop arrangements, under which 49 per cent of the workers could be thrown into the streets unless they joined a labor organization favored by the 51 per cent."

Senator Wagner defended the proviso. In a colloquy with the witness Colley, page 430 of the same hearings, the following appeared:

> "Senator Wagner. What state are you from?
>
> Mr. Colley. Pennsylvania.
>
> Sen. Wagner. In Pennsylvania closed shops are legal, are they not?
>
> Mr. Colley. That is right.
>
> Sen. Wagner. Therefore under the Pennsylvania statute today your management can make an agreement with the majority of your workers now for a closed shop?"

It appeared that Colley was executive chairman of the employee representatives of the Butler, Pennsylvania, Works of the American Rolling Mill Co. and represented the majority of the employees. Senator Wagner said:

"Now, there is not anything there that cannot be done today in your State, because the management must first agree to it. In effect, it is a limitation, and then it must be agreed to by a majority of your workers. Today, in your State, your management could enter into a closed-shop agreement without the consent of the majority of your workers. This is a greater protection than you have today in the law, because now, before the closed-shop agreement can be forced upon you, a majority of the men you represent must agree to it, in addition to the management, which is not the case now in Pennsylvania, because the management can agree with one leader, with you, for a closed shop."

Senator Wagner's attitude on the Act further appears in debates on the floor of Congress. Congressional Record, Vol. 79, Part 7, 74th Congress, first session, May 15, 1935, page 7673 et seq. Senator Wagner engaged in a colloquy with Senator Hastings, who was concerned, as Senator Wagner said, "**with what happens to the minority.**" Hastings cited the closed shop proviso and Senator Wagner said:

"The Senator apparently does not understand that provision. It does no more than to legalize a closed-shop agreement, which is a matter of agreement between employer and employees where it is now sustained by the public opinion of the state.

Mr. Hastings. This language is perfectly clear. Does it not say, in so many words, that if the employer so desires, and the majority of the labor union so desires, they may make an agreement whereby no one may be employed in the establishment unless he belongs to that union, and will not that provision in this bill compel a minority of employees in that particular shop or that particular unit to join that union, whether they wish to or not, and pay all the fees which the union may desire to charge?

Sen. Wagner. The provision will not change the status quo. That is the law today; and wherever it is

the law today that a closed-shop agreement can be made, it will continue to be the law. By this bill we do not change that situation. Closed-shop agreements are made all over the country, and they are matters of agreement. The question of compulsion is not involved in them. Closed-shop agreements are very well known in this country, and they are mere matters of agreement."

In answer to the contention of Senator Walsh, who interjected some remarks to the effect that there was no compulsion upon an employer to give his consent, Senator Hastings said:

"What does the Senator mean by saying that the employer must give his consent? If 51 per cent of his employees demand a certain thing, is he not obliged to consent or have a strike on his hands?"

Senator Robert F. Wagner, the author of this Act, knew what the law did. He was almost apologetic when he said he "held no brief" for the closed shop and that he was making the closed shop no more legal than it had ever been, that he was accepting it as it was.

In a formal statement by Senator Wagner before the Senate Committee on Education and Labor, 74th Congress, first session, in the hearings above quoted on Senate Bill 1958, appearing on page 41, Senator Wagner stated as follows:

"Furthermore, the terms of the bill do not compel or even encourage a man to join any union. Nothing could be more false than the charge that a gigantic closed shop would be forced upon industry. The much-discussed closed-shop proviso merely states that nothing in any Federal law shall be held to illegalize the consummation of closed-shop agreements when they are sought by the majority of the employees in a unit to be covered by them when made. This insertion is necessary to prevent repetition of these mis-

taken interpretations which have held that Congress intended to outlaw the closed shop when it enacted section 7 (a) of the Recovery Act.

"**I hold no brief for or against the closed shop.** But there are many who believe that it is a device which at times may be necessary to advance and preserve the living standard of employees. It is legal in New York, in Massachusetts, and in many other States. **Upon this subject, no sufficient reason has been advanced why Congress should change the status quo.**" (Emphasis ours.)

The Senate Committee report on the bill, No. 573, dated May 2, 1935, Serial No. 9879, page 11, referred to above, said:

"Problem of the Closed Shop.—The proviso attached to the third unfair-labor practice deals with the question of the closed shop. Propaganda has been wide-spread that this proviso attaches special legal sanctions to the closed shop or seeks to impose it upon all industry. This propaganda is absolutely false. The reason for the insertion of the proviso is as follows: According to some interpretations, the provision of Section 7 (a) of the National Industrial Recovery Act, assuring the freedom of employees 'to organize and bargain collectively through representatives of their own choosing,' was deemed to illegalize the closed shop. The committee feels that this was not the intent of Congress when it wrote section 7 (a); that it is not the intent of Congress today; and that it is not desirable to interfere in this drastic way with the laws of the several States on this subject.

"But to prevent similar misconceptions of this bill, the proviso in question states that nothing in this bill, or in any other law of the United States, or in any code or agreement approved or prescribed thereunder, shall be held to prevent the making of closed shop agreements between employers and employees. In other words, the bill does nothing to facilitate

closed-shop agreements or to make them legal in any State where they may be illegal; **it does not interfere with the** *'status quo'* **on this debatable subject** but leaves the way open to such agreements as might now legally be consummated, with two exceptions about to be noted. (Emphasis ours.)

"The assertion that the bill favors the closed shop is particularly misleading in view of the fact that the proviso in two respects actually narrows the now existent law regarding closed-shop agreements. While today an employer may negotiate such an agreement even with a minority union, the bill provides that an employer shall be allowed to make a closed-shop contract only with a labor organization that represents the majority of employees in the appropriate collective-bargaining unit covered by such agreements when made.

"Secondly, the bill is extremely careful to forestall the making of closed-shop agreements with organizations that have been established, maintained or assisted by any action defined in the bill as an unfair labor practice. And of course it is clear that no agreement heretofore made could give validity to the practices herein prohibited by Section 8."

The Committee on Labor for the House of Representatives on the same Act, made a report, No. 1147, dated June 10, 1935, Serial No. 9888, page 19:

"The proviso to the third unfair labor practice, dealing with the making of closed-shop agreements, has been widely misrepresented. The proviso does not impose a closed shop on all industry; it does not give new legal sanctions to the closed shop. All that it does is to eliminate the doubts and misconstructions in regard to the effect of section 7 (a) upon closed-shop agreements, and the possible repetition of such doubts and misconstructions under this bill, by providing that nothing in the bill or in section 7 (a), or in any other statute of the United States shall illegalize a closed-shop agreement between an employer and

a labor organization, provided such organization has not been established, maintained, or assisted by any action defined in the bill as an unfair labor practice and is the choice of a majority of the employees, as provided in section 9 (a) in the appropriate collective bargaining unit covered by the agreement when made. The bill does nothing to legalize the closed-shop agreement in the States where it may be illegal; but the committee is confident that it would not be the desire of Congress to enact a general ban upon closed-shop agreements in the States where they are legal. And it should be emphasized that no closed shop may be effected unless it is assented to by the employer."

The exact language above quoted is also found in Report 972 of the House Committee on Labor (Serial No. 9887), after considering the National Labor Relations Board bill. This report was dated May 21, 1935, and the above quotation appears on page 17.

The foregoing quotations should be sufficient to indicate, first, that Congress intended to accept the status quo in regard to the law on closed shop agreements, and second, that it considered the closed shop clause an exception to the general majority rule.

There is no reconciling these two inconsistencies. In the first place, the employer, under what the Circuit Court of Appeals for the Fourth Circuit refers to as the "general purpose of the act," may have nothing to say about union membership. But here is a manifest inconsistency, for he may make a contract to require union membership and thereby promote and acquiesce in the exclusion of non-members.

Second, "majority rule" means that the majority speaks for the minority, but the closed shop is inconsistent with such a rule because manifestly the majority cannot and should not represent or speak for a minority that they will not accept as co-workers and whom they insist upon excluding from employment.

Congress enacted this law to promote and protect collective bargaining, and it accepted, along with majority rule, the existing closed shop policy of unionism, with all its inherent defects.

The inconsistency between the closed shop clause and the rule of majority representation was pointed out by many contemporary writers. In his excellent work entitled "Cases and Material on Labor Law," 1944, Milton Handler, page 68, cites some recent discussions, among others the following found at page 62:

> "The closed shop is definitely unfair where a minority does not wish to belong to the union. The closed shop involves an issue which cannot justly be determined by majority rule. It is one thing for a minority to abide by the will of a majority in an organization to which both voluntarily belong. It is quite another thing for the majority of employees to compel a minority to become part of and subject to an organization that may be totally repugnant to that minority. Ernest Weir: Closed Shop, N. Y. Times Magazine, Aug. 2, 1942, page 7."

(2) **The history of labor unions as well as the reported cases show that the closed shop policy of unions has always contemplated exclusion not only of non-unionists but also members of hostile or rival unions.**

Whatever the merits of the controversy over the closed shop, it is nevertheless true that entirely sympathetic and objective students of labor unions have recognized the compulsory or coercive and exclusive character of the closed shop policy.

In a recent book on "Collective Bargaining Systems" (Washington, American Council on Public Affairs, 1942), E. C. Pierson discusses the legality of closed shop agreements. He is entirely clear about the coercive effect on the individual worker of this institutional policy, whether the worker is an old employee or a new employee refused

because of non-membership. He says: "The worker who refuses to join a union and loses his job as a result is being coerced either way."

Toner in his work entitled "The Closed Shop" (Washington, D. C., 1942), speaks of the "spirit of exclusion" that is historically an element of the closed shop policy. He says: page 36:

> "Discharge of non-unionists from positions or occupations covered by the closed shop agreement is an essential part, implied or expressed, of every such agreement and it is a condition to which the employer must consent."

In an article in the Harvard Law Review on the Triboro case, 56 Harv. Law Rev. 584; the author says:

> "But the result of a valid closed shop contract is to require the employer on demand by the controlling union and for its benefit to make use of just the sort of coercion which the law forbids the employer to use for his own benefit. Before the new laws the employer could legally say: 'John, you are fired because you have not joined my Dependent Brotherhood of Employers Employees.' He can no longer say this; but a union with a valid closed shop contract can compel the employer to say: 'John, you are fired because you have not joined Local 111.' By such procedure the union is enabled, after it once represents a majority and obtains a valid closed shop agreement, properly to obtain unanimity, and there is the rub—to keep that unanimity."

We can even go back to the classical work of Sidney and Beatrice Webb, entitled "Industrial Democracy," first published in 1897, to show the compulsory nature of the closed shop and the early and fundamental character of the policy. The authors say at page 213:

> "There is a strange delusion in the journalistic mind that this compulsory Trade Unionism, enforced by

refusal to work with non-unionists, is a modern device, introduced by the New Unionists of 1889. Thus Mr. Lecky states as a fact that the establishment of monopolies and the exclusion, 'often by gross violence and tyranny,' of 'non-unionists from the trades they can influence' is specially marked 'among the New Unionists.' But any student of Trade Union annals knows that the exclusion of non-unionists is, on the contrary, coeval with Trade Unionism itself, and that the practice is far more characteristic of its older forms than of any society formed in the present generation. The trade clubs of handicraftsmen in the eighteenth century would have scouted the idea of allowing any man to work at their trade who was not a member of the club. And at the present day it is especially in the old fashioned and long established unions that we find the most rigid enforcement of membership. Among the Coalminers it is the men of Northumberland, Durham and the West Riding of Yorkshire, strongly combined for a whole generation, who have set the fashion of absolutely refusing to 'ride' (descend in the cage) with non-unionists. In the best organized industries indeed, whether great or small, such as the Boilermakers, Flint Glass Makers, Tape-sizers, or staff-pressers—the very aristocracy of 'Old Unionists'—the compulsion is so complete that it ceases to be apparent. No man not belonging to the union ever thinks of applying for a situation, or would have any chance of obtaining one. It is, in fact, as impossible for a non-unionist plater or riveter to get work in a Tyneside shipyard, as it is for him to take a house in Newcastle without paying the rates. **This silent and unseen, but absolutely complete compulsion is the ideal of every Trade Union.** It is true that here and there an official of an incompletely organized trade may protest to the public, or before a Royal Commission, that his members have no desire that any workman should join the union except by his own free will. But, however bona fide may be these expressions by individuals, we invariably see such a union, as soon as it secures the adhesion of a

majority of its trade, adopting the principle of compulsory membership and applying it with ever greater stringency as the strength of the organization increases." (Emphasis ours.)

The exclusion of immigrants by the early American labor movement between 1886 and 1887 is cited in the continuation of Commons History of the Labor Movement in the United States, Vol. 4, by Perlman and Taft.

Exclusion of Rival Unionists.

The exclusion of members of rival unions has also been a characteristic of the labor movements.

Let us go to a classical work on the subject. In Series XXXIX of the Johns Hopkins Studies, Frank T. Stockton writes on "The Closed Shop in American Trade Unions." This work is dated 1911. He says in this work, page 66:

"**Members of rival unions.** When the trade or territorial jurisdiction claimed by two unions is identical or overlaps, the members of the two unions ordinarily refuse to work with each other. In 1898, for instance, the 'Baltimore organization' of painters in its struggle with the 'Lafayette organization' declared all painters affiliated with the Baltimore headquarters to be non-union men (Plant v. Wood, 176 Mass. 492, is cited in the footnotes). **Seceding local unions and the national union have always been especially hostile to one another.** When the trade unions from 1881 on began to demand independence from the Knights of Labor, the latter refused to allow members of the unions to be employed in the shops controlled by them. It was recognized very early that the closed shop might be a powerful weapon in many jurisdictional disputes. Among those in which it has been used in recent years are the disputes between the Glass Bottle Blowers and the Flint Glass Workers, between the United Brotherhood of Carpenters and the Wood Workers, between the Plumbers and the Steam Fitters, between the

Granite Cutters, the Stone Cutters and the Marble Workers, and between the Bricklayers and Masons and the Plasterers." (Emphasis ours.)

The same bitterness between unions was demonstrated in jurisdictional disputes.

"In commenting upon the constantly recurring jurisdictional disputes between trade unions, the editor of the Plumbers, Gas Fitters and Steam Fitters' Journal in 1896 lamented that less courtesy had ordinarily been shown to the holder of an 'opposition card' and that life had been made 'more bitter' for him than in the case of 'one who has always remained outside the pale of united labor and who has always been inamicable to its interests.' The unions have felt that when a non-unionist secures employment in a shop controlled by them, it will not ordinarily be difficult to induce him to join their ranks. **But the union in control is extremely reluctant to allow a member of a rival or hostile union to be employed in a shop. There is always the danger that he may win over the shop to his own union.**" (Emphasis ours.)

In another place Mr. Stockton, who gives both sides of the argument, comments that employers have learned that "one trial is enough to demonstrate the fact that members of rival unions tolerate each others' presence less than they do that of non-unionists."

The View of Mr. Leisserson.

William Leisserson, former member of the Board, who has given his lifetime to the study of labor problems has recognized that closed shop contracts which are sanctioned by the Act may have undesirable effects. However, he stated:

"It is for the Congress and not for the Board to make the modifications." See **Rutland Court Owners, Inc.**, 44 NLRB 587, l. c. 603.

He pointed out in a dissenting opinion in this case that if the closed shop clause of the Act is to be interpreted as forbidding exclusion from membership of employees who are hostile to the union, many provisions of union constitutions and by-laws will be invalidated. He cited, as example, the constitution of the United Mine Workers, which requires expulsion of any member in a long list of presumptively hostile organizations mentioning, among others, the Klu Klux Klan and the National Chamber of Commerce! A similar provision in the constitution of the International Brotherhood of Electrical Workers was cited by the Board without comment in **Ansley Radio Corp.**, 18 NLRB 1028, l. c. 1043, which constitution required expulsion of any member working in the interest of any organization opposed to the union.

Contemporary writers have recognized the existence of the trade union policy of excluding rival unionists as an incident to the closed shop.

Jerome Toner, in his book on "The Closed Shop" (Washington, D. C. 1942), recognizes the closed shop as an instrument of policy in intra-union rivalry. He says at page 163:

> "Several important functions of the closed shop have already been described. Another pertains to the control of employment opportunities. Here the contest is twofold: **First, and by far the fiercer, are jurisdictional disputes or intra-union wars.**" The second is, of course, the contest with the non-union worker. (Emphasis ours.)

At page 164 he says:

> "The trade jurisdiction is also protected by means of the closed shop, first, against nonunionists and, second, against unionists who are not members of the local or district council holding the contract."

At page 165 appears a sentence containing a significant parenthesis:

> "Under existing law the closed shop seems to be the only legal way by which a union can protect job opportunity for its members against the right of the individual non-unionists **(rival unionists of course have the same standing)** to make individual agreements with the employer."

Joel Seidman, in his book, "Union Rights and Union Duties" (New York 1943), discusses various types of exclusionary practices by unions. He says, at page 36:

> "Since a union is free to determine the qualifications for membership it can exclude undesired groups from union benefits by writing the prejudices of its members into constitution, ritual or by-laws and in a completely organized industry operating under closed shop contracts disbars them from employment."

He cites as examples of victims of such policy aliens, Asiatics, women, religious denominations (pp. 36-37). He then discusses negro exclusion (pp. 37-39) and political discrimination (p. 39). He refers to the provision of the constitution of the United Mine Workers barring communists (p. 39) and similar provisions in the by-laws of the Carpenters (p. 40).

See also, R. R. R. Brooks, "When Labor Organizes" (Yale Univ. Press, 1937), at page 224. He talks about the exclusionary policy of the closed union in conjunction with the closed shop and says:

> "In this respect the closed shop ceases to be an organization device designed to compel nonunion workers to support union policies, and becomes a method of limiting employment to those workers fortunate enough to be in the union at the time of the adoption of the closed union policy."

Pierson, F. C., in "Collective Bargaining Systems" (Washington, D. C. 1942), discusses at length union exclusions under closed shop agreements. He refers to the confusion of the court decisions but admits there is no rule of thumb to be followed. After speaking of the many factors to be considered by a court in ruling on closed shop agreements, he suggests, at page 53, that if the closed shop contract is designed to prevent the employer or employers from undermining the union, the agreeent should be held valid and then he has the following significant suggestion to make:

> "This approach would place burdens on the courts which they are not in a position to assume. Much discretion would rest with the individual judge. A simpler view would be to hold closed shop agreements invalid only under exceptional circumstances—where, for example, there is unmistakable evidence of fraud or of malicious design to injure or damage."

(3) Recent decisions of the state courts have interpreted the closed shop proviso of labor relations acts identical in terms to the National Labor Relations Act to evidence legislative approval of the closed shop with the following results:

(a) The policy recognized is a definite exception to the principle of a majority rule otherwise recognized in the Act.

(b) State courts which formerly held closed shop contracts to be contrary to public policy in the face of union monopoly of the employment, now no longer recognize monopoly as a ground for invalidating closed shop contracts.

Massachusetts adopted a Labor Relations Law in 1937 almost identical with the Federal Act. It has been held that: "The public policy of both the Act of Congress and

our statutes has been held to be the same.'" **Hathaway Bakeries, Inc., v. Labor Relations Commission** (1944), 55 N. E. (2d) 254, ... Mass. ....

The Supreme Judicial Court of Massachusetts has held that the closed shop proviso of the Act meant that the individual plaintiffs, who declined to join the union under a closed shop contract, had surrendered their individual rights, and that majority rule included the right of the majority to exclude the minority. **Hamer v. Nashawena Mills, Inc., et al.** (1943), 52 N. E. (2d) 22...

In this case the plaintiffs were employees of the mill which had, prior to 1943, been organized by an A. F. of L. union with a closed shop. When this contract with A. F. of L. terminated, an election was held and a CIO union was certified, and made a contract with the textile mills which also contained a closed shop clause. The contract gave employees thirty days in which to join. The suit was brought by employees of the mills who had been solicited to join the CIO, but who refused to join and refused to quit their jobs. (There was a saving clause in the contract that permitted employment of nonunion employees if they could not be replaced by the union.) The court said it was fairly inferable that if a supply of labor became available the plaintiffs would be discharged. The plaintiffs sought an injunction, which was denied by the court. The court said the defendant union had been elected by a majority of the employees of the bargaining unit, to which the plaintiffs belonged, and that the union was acting "not merely for its own members but as the representatives of all employees included in the unit." The court held the plaintiffs had surrendered to the union their right to deal individually. The execution of a closed shop agreement by this union was permissible, the court said, under the state and federal law, and the union had the right to determine working conditions, including authority to agree upon a closed shop.

The court pointed out that the defendant union was expressly designated by the National Labor Relations Act as the exclusive bargaining representative of all such employees, and said:

> "It would be strange if an employer, who is required to enter into negotiations for a contract with the designated union and who in the event that the execution of a contract results is bound to observe its terms and provisions, would not be able to enforce the contract which settled wages, hours of labor and other working conditions because he agreed with the union to conduct a closed shop. To set aside a contract upon that basis would be contrary to the public policy of the nation. * * * There is nothing in the plaintiff's contention that the defendant union was without power to execute a closed shop agreement."

The decision in this case is clearly contrary to the view of the court in the instant case, to the effect that the closed shop "was never intended to authorize the majority to discriminate against a minority because of prior union or antiunion activities." The case holds that the majority has a right to dictate a closed shop and thereby exclude such of the minority as fail to join the majority union.

The highest court in New York has held that the New York Labor Relations Law, with its proviso authorizing closed shop contracts, has recognized such contracts as in accord with public policy and in conjunction with the exemption of unions under the anti-trust laws, has resulted in legalizing the exclusion from employment of nonunion members, even where the union has an acknowledged monopoly of employment in the locality. The case is cited for two reasons: (1) Because it demonstrates that the rights of minorities must give way under the provisions of the closed shop clause to the institutional policy adopted, and (2) because the court holds that the remedy is legislative and not judicial.

New York has also adopted a labor relations act with a closed shop proviso similar to the clause in the federal act. The New York Act was adopted May 20, 1937, effective July 1, 1937.

This is the case of **Williams v. Quill** (1938), 277 N. Y. 1, 12 N. E. (2d) 547. This was an action by an employee of the transit lines in New York City against the President of the Transport Workers Union of America to enjoin that union from entering into a closed shop contract with the plaintiff's employer. An election had been held and the Transport Workers Union of America had been certified by the New York State Labor Board as the proper bargaining agency. The New York Labor Law was quoted, making it unfair labor practice for an employer to encourage membership in any labor union and also the proviso that nothing in the article should preclude an employer from making closed shop contracts. There was nothing in the case to indicate that any individual injury was sought or intended to the plaintiff but that the object of the contract and of the defendant union was to advance its own interest through the closed shop. The plaintiff's theory was that since the defendant union controlled all the main transit lines in the locality that a monopoly would be created which would deprive the plaintiff of any market for his labor. The judgment was for the defendants and the injunction was denied. The court declared:

> "The one reservation in this law is that the attempt to accomplish the end shall be carried out in good faith and for the declared purposes and not through malice or ill-will, or a desire to injure nonunion employees, or simply and solely for the purpose of keeping them out of work."

The court distinguished **Curran v. Galen**, 152 N. Y. 33, 46 N. E. 297, on the ground that in that case malice, ill-will and intended injury was involved. The court also

quoted **Jacobs v. Cohen**, 183 N. Y. 207, 76 N. E. 5, a closed shop case to the effect that a closed shop contract was legal, and said:

> "That, incidentally, it might result in the discharge of some of those employed for the failure to come into affiliation with their fellow-workmen's organization, or that it might prevent others from being engaged upon the work is neither something of which the employers may complain nor something with which the public policy is concerned."

It is interesting to note that the New York court in this case, citing the New York Labor Relations Law, stated that "it evidently recognized the existing law." The court was also influenced by the fact that the New York state laws against monopolies exempted labor unions, citing **Exchange Bakery etc. v. Rifkin**, 245 N. Y. 260, 157 N. E. 130. The court said, 12 N. E. (2d) 549:

> "This case has become the law of this state and has been followed in other instances. Therefore we approach this case in the light of the law as it was before Section 704 of the Labor Law was adopted, and we find that a labor organization is permitted to combine and strike in a particular industry for the purpose of obtaining employment for its own people, even to the extent of excluding others from the entire industry who are not union men."

The State of New Jersey has never adopted a labor relations act but has likewise abandoned and apparently overruled the cases such as **Wilson v. Newspaper and Mail Deliverers Union of New York**, supra (1938), 123 N. J. Eq. 347, 197 Atl. 720, holding that a closed shop contract is illegal if the union has a monopoly of the employment in the locality.

In **F. F. East Co. Inc. v. United Oystermen's Union** (1941), 130 N. J. Eq. 292, 21 Atl. (2d) 799, the highest

court in New Jersey reversed Vice Chancellor Sooy in the same case reported in 128 N. J. Eq. 27. The complaint alleged in this case that the closed shop contract of the Oystermen was monopolistic because 95 per cent of the employment was involved. It appeared that the union had not used coercion or any illegal acts and no complaint of exclusion was made. The Vice Chancellor had held the contract monopolistic and void, on the authority of many prior New Jersey cases, but on appeal the Court of Errors and Appeals reversed the case, citing **Kingston Trap Rock Co. v. International Local 825**, 129 N. J. Eq. 570, 19 Atl. (2d) 661. The court cited the state statute which prohibited injunctions against agreements requiring membership in a union as a condition of employment and also the National Labor Relations Act in the following words:

> "Moreover the contract is not against public policy. The National Labor Relations Act specifically authorized closed shop contracts. 49 Stat. 449, at 452; 29 U. S. C., section 758. This act is applicable in the instant case, because the complainants are engaged admittedly in interstate commerce. Our legislature has likewise declared such contracts lawful as a matter of public policy. N. J. S. A. 2:29-77.1 provides that no injunction shall issue prohibiting requirements that 'all employees of a particular employer or group of employers shall be members of a particular labor organization.' That clearly refers to closed shop contracts.
>
> "The contract under review being entirely lawful, it follows that the order appealed from be reversed."

VII.

The Problem Here Presented Is for the Legislature, Not for the Courts: The National Labor Relations Act Does Not Purport to Regulate Unfair Practices of Labor Unions, a Deficiency Which Has Been Recognized and Repaired in Recent State Legislation by Statutes Invalidating Closed Shop Contracts Where It Is Shown That the Union Unreasonably Excludes Employees From Membership; Also by Statutes Limiting Racial and Other Discriminatory Exclusions.

In the case of **National Labor Relations Board v. Jones & Laughlin Steel Corp.** (1937), 301 U. S. 1, 81 Law. Ed. 893, this court commented on the National Labor Relations Act in the following language:

> "The Act has been criticized as one-sided in its application; that it subjects the employer to supervision and restraint and leaves untouched the abuses for which employees may be responsible. * * * But we are dealing with the power of Congress, not with the particular policy, or with the extent to which policy should go. We have frequently said that the legislative authority exerted within its proper field need not embrace all the evils within its reach."

The citation of any further authority is unnecessary to show that the Act does not purport to regulate the unfair practices or other practices of labor unions; the Act speaks for itself in that respect.

It has not only been suggested that the Act is deficient in its failure to regulate the conduct of trade unions, but the very danger of unreasonable exclusion by unions holding closed shop contracts has been recognized in recent state legislation similar to the National Labor Relations Act.

Furthermore, the recent legislation shows that it is the province of the legislature and not of the courts to supply the defect.

It was contended in the New York cases above cited, notably **Williams v. Quill**, supra, and **Miller v. Ruehl**, supra, that if the evil of exclusion by trade unions is to be reached, it is for the legislature and not for the courts; that the closed shop proviso contained in the New York Act, identical in wording to the Federal Act, evidences a policy favoring the closed shop with exclusion from employment, even where the union has a monopolistic position.

The earlier Labor Relations Acts of New York and Massachusetts contained no limitations upon closed shop contracts countenanced by the Act. These were adopted by New York on May 20, 1937, effective July 1, 1937, and by Massachusetts on May 29, 1937. Later legislation in other states has remedied the defect.

It is apparent that the legislatures of a number of states have felt that the closed shop proviso in its present form requires limitation if it is to prevent unreasonable exclusion by trade unions and hence exclusion from employment.

Pennsylvania. Probably the most significant legislation is that in the State of Pennsylvania. The Labor Relations Act of that state was adopted on June 1, 1937, Act 294, Public Laws, page 1168, and this act contained a definition of unfair labor practices which, in Section (), contained wording identical to that of Section 8 (3) of the federal law. In 1939 this section was amended by adding at the end of the proviso the following words:

"and if such labor organization does not deny membership in its organization to a person or persons who are employees of the employer at the time of making such agreement; provided such employee was not employed in violation of any previously existing agreement with said labor organization." Act of June 9, 1939, P. L. 162. Laws of Pennsylvania 1939, page 293.

Wisconsin. The employment Peace Act of Wisconsin, being Chapter 111 of the Wisconsin statutes, enacted by Chapter 57, Laws 1939, approved May 2, 1939, contained in Section 111.06 (c) a definition of unfair labor practices and prohibited employers from encouraging or discouraging membership in unions, with the proviso that "an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees in the collective bargaining unit," and then followed a further proviso authorizing the Board to:

> "declare any such all-union agreement terminated whenever it finds that the labor organization involved has unreasonably refused to receive as a member any employee of such employer, and each such all-union agreement shall be made subject to this duty of the Board." Wisconsin Statutes 1939, Sec. 111.06 (c).

The most recent acts which have been found contain similar limitations upon the closed shop clause:

Colorado adopted a state labor relations act, effective April 1, 1943, and in Section 6 (1) c, defining unfair labor practices, incorporated a proviso permitting employers to enter into "all union agreements" when three-fourths or more of its employees shall have voted affirmatively by secret ballot in favor of such all union agreement in a referendum conducted by the State Commission, and then added the following:

> "The commission shall declare any such all union agreement terminated whenever it finds that the labor organization involved unreasonably has refused to receive as a member any employee of such employer, and each such all union agreement shall be made subject to this duty of the Commission. Senate Bill 183, Laws 1943, effective April 1, 1943." 1943 Session Laws of Colorado, page 392.

Texas. The State of Texas, by House Bill 100, Laws of 1943, effective July 5, 1943, passed an act regulating labor unions, which contained the following proviso in Section 10:

> "Members' rights. It shall be unlawful for a labor union to refuse to give any one desiring membership a reasonable time, after obtaining the promise of employment, within which to decide whether or not he desires to become a member as a condition of such person's employment. No labor union may expel a member except for good cause and upon a fair and public hearing by the organization, after due notice and an opportunity to be heard on specific charges preferred. A court shall reinstate anyone expelled without good cause."

Section 8 of this Bill limits the collection of money or fees for the privilege of working. The proviso of this section stated: "Nothing hereinabove stated shall be construed to prevent a closed shop contract or other type of bargaining agreement or to limit the bargaining power of a labor union." Vernon's Texas Statutes, 1943 Supplement, Laws 48th Regular Session, Title 83, Art. 5154a.

Racial and Other Discrimination.

That legislative rather than judicial legislation is necessary to meet and regulate union rules excluding membership is also evidenced by recent statutes against the exclusion of employees from unions by reason of race, color or religion. Exclusion of union members by reason of hostility to the union is perhaps not so extreme in its unfairness as exclusion by a union on account of race, color or religion, as this exclusion invades ordinary civil rights.

New York State is the leader in this field of legislative reform. Its Labor Relations Law contains the provision:

> "No labor organization shall hereafter directly or indirectly by ritualistic practice, constitution or by-

law prescription, by tacit agreement among its members, or otherwise, deny a person or persons membership in its organization by reason of his race, color or creed, or by regulations, practice, or otherwise deny to any of its members, by reason of race, color or creed, equal treatment with all other members in any designation of members to any employer for employment, promotion or dismissal by such employer." Chapter 6, Sec. 43, as added by Chapter 49, Sec. 1 of the Laws of 1940, effective Feb. 14, 1940.

Criminal penalties are attached to violation of this provision. The provision was held valid in **Railway Mail Assn. v. Corsi**, 1944, N. Y. Sup. Ct. App. Div., 8 Labor Cases, Sec. 62,311.

New York also has a statute forbidding discrimination on account of race, creed, color or national origin on national defense projects. Chapter 478, Laws of 1941, (amended to include "national origin" by Chapter 676 of the Laws of 1942).

The Labor Relations Law of Pennsylvania defines labor organizations and excludes from that definition any organization which, by any means, "denies a person or persons membership in its organization on account of race, creed or color or political affiliations." The "political affiliations" phrase was added by an amendment of May 27, 1943, Act No. 315, Laws of Pa. 1943, page 743.

The statutes of the State of Kansas provide that no labor organization which discriminates against, or bars, or excludes from its membership any person because of his race or color shall represent any unit of employees for collective bargaining purposes. Railroads and air carriers are excepted. 1941 Supplement to the General Laws, Annotated, of 1935, Sec. 44-801, Laws of Kans. 1941, page 428.

The labor laws of the State of Nebraska (Cumulative Supplement of 1941, to the Compiled Statutes of 1929, Sec. 48-801) provide that it is the policy of the state that no

representative agency of labor, in collective bargaining, shall discriminate against any person because of his race or color. The Department of Labor is charged with enforcement of this provision.

California and Illinois have passed statutes in connection with national defense work forbidding discrimination on account of race or color. The California Act applies to public works and also forbids discrimination on account of religion (Laws of 1939, Chapter 643, Sec. 1735). The Illinois statute applies to war defense contractors and forbids discrimination against any citizen of Illinois because of race or color. Ill. Revised Statutes of 1943 (State Bar Assoc. Ed.), Chapter 29, Sec. 24 (c); Smith-Hurd Ill. Annot. Statutes, Ch. 29, Sec. 24 (c).

Racial Exclusions Distinguished.

The exclusion of hostile employees or members of rival unions is to be distinguished from exclusions in violation of civil rights, such as racial discrimination, but even in this field *quaere* whether judicial application of constitutional policy should not wait on legislative action, already applied in several states.

As pointed out above, the National Labor Relations Act is directed at the establishment and protection of trade unions and it is therefore established that the strengthening of unions of working men is a national policy. Abuses of power by trade unions may appear requiring judicial disapproval and it would appear possible for the courts to hold that judicial ruling is necessary and appropriate where such abuses of privileges assured to unions are exercised in violation of civil rights. A suggestion to this effect is found in the article above referred to in 43 Col. L. Rev. 42, on "The Closed Union and the Right to work," by Ralph A. Newman. He cites the uniform holdings that courts will not interfere to require admission to unions of new members (p. 46):

> "In no case has admission to membership in such a situation been ordered in a common law jurisdiction."

Progressing to the cases where old members have been expelled, or present members sue to enjoin enforcement of invalid by-laws, he cites four cases where the courts relieved against by-laws such as expulsion for exercising political rights,[1] or unfair classification of members.[2]

The author concludes the remedy in any case is legislative, citing some of the statutes mentioned above and then adds (p. 54):

> "The suggestion is submitted that the National Labor Relations Act be amended so as to give to the Board supervisory powers over the reasonableness of admission requirements established by labor unions."

This court is to be concerned with the problem of racial discrimination. That problem is not here involved and is not for decision in this case. But the petitioner submits that whatever the decision may be as to the violation of civil rights in the application of closed shop contracts, the Congress has chosen not to limit or supervise the exercise of the power of exclusion by a union where the practice is to protect and strengthen the union. Certainly the employer should not be charged with so difficult a responsibility.

Trade unions are now protected by law, pursuant to the long recognized principle that solidarity is essential to them in the economic conflict.

Scopes v. Helmar (1933), 205 Ind. 596, 187 N. E. 662, 663; Interborough Rapid Transit v. Lavin (1928), 247 N. Y. 65, 79, 159 N. E. 863, 868; Goldfinger v. Feintuch (1937), 276 N. Y. 281, 286, 11 N. E. (2d) 910, 913.

It is submitted that in adopting the National Labor

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1 Spayd v. Ringing Rock Lodge (1921), 270 Pa. 67, 113 Atl. 70.
2 Cameron v. International Alliance, supra.

Relations Act, Congress intended to affirm this policy. It might have limited the privileges conferred. It might have said, "These unions now so privileged and protected, are custodians of the individual right to work and we will also protect this right." Congress did not do so. Congress adopted the closed shop and the right to exclude, to strengthen the institution, and sacrificed to that extent any concern for the right of the individual against the institution. The moral and social justification for the closed shop rests on the need of sacrificing personal interest to group welfare. Toner, op. cit., p. 173.

Congress consciously and expressly adopted the status quo. It is a matter for legislative action. Certainly it is not a matter to be placed in the hands of employers. The suggestion of the Circuit Court of Appeals that it was the duty of the employer in this case to "protect" the minority is not only contrary to the purpose of Congress in enjoining a "hands off" policy; it is also a dangerous suggestion to place in the hands of an employer who has been bedeviled, as in this case, with competing unions, to decide between the contending factions and futile to require the employer to insist that, after intense industrial conflict, the contending parties accept their rivals into membership.

VIII

The Court Erred in Its Failure to Recognize That the Board in This Case Was Passing Upon the Validity of Its Own Acts and in Such a Case Should Not Be Entitled to the Benefit of the Presumption That Its Findings Are Valid If Supported by Substantial Evidence, But, on the Contrary, All the Evidence Should Be Considered.

This brief is already entirely too long and the petitioner can only suggest in bare outline the reasons why the court below should have considered all the evidence rather than

resting satisfied with the inferences of the Board, on circumstantial evidence, holding the employer guilty and penalizing him for a solution of his dilemma, which solution erred, if at all, on the side of recognition of the Board's certification and compliance with his settlement and contractual obligation.

To a large extent the Board in this case was passing upon the validity of its own acts and the conduct of its own agents. The parties had resorted to the Board itself for approval of the settlement agreement and the Board had approved in writing the withdrawal of the charges and the arbitration of the question of representation. The Board placed the employer in the position of requiring it to bargain with a certified agent and then penalized him for doing so. While the Board did not itself repudiate the settlement, it sponsored in its complaint the repudiation of the settlement by the CIO after it had lost. It has consistently refused to face its own responsibility and that of its agents in such a case, and lightly passes over the dangerous consequences if the public with which it deals loses confidence in its scrupulous regard for simple doctrines of fair play. The Board and the Court alike have placed light value upon the obligation of contracts.

Armed as it is and entrusted with the responsibility of making conclusive findings of fact even upon circumstantial and hearsay evidence as in this case, the possibilities inherent in the exercise of its power, if it is allowed to repudiate its own agents, is manifestly vast in its implications.

There is not much authority on this point. The language above used appears in the opinion of the court in **N. L. R. B. v. Sun Shipbuilding and Dry Dock Co.** (CCA 3rd, 1943), 135 Fed. (2d) 15, where the Board disestablished a bargaining agent which was the duly certified choice of a majority of the employees as the result of an election con-

ducted by the Board. In other words, the case did not involve a contractual settlement agreement. The court said, page 18:

> "But manifestly the possibilities inherent in the exercise of such power upon a complaint filed long after a theretofore unquestioned certification and for matters which allegedly occurred in the formation of the bargaining agent prior to the election, are so vast in their implications as to require an especially detailed scrutiny of the evidence in order that it may be determined with reasonable certainty whether the findings whereon the Board directs disestablishment in such circumstances are justified."

It will serve no purpose to cite the opinions of this Court on the limits to which administrative tribunals will be permitted to extend their discretion. The gist of the cases is understood as holding that the court will not hesitate to review a record to determine whether the elementary principles of fair play have been followed.

Morgan v. U. S. (1938), 304 U. S. 1, 82 Law. Ed. 1129; **U. S. v. Abilene & S. R. R. Co.**, 265 U. S. 274, 286-290, 68 Law. Ed. 1016, 1021-1023; **St. Joseph Stock Yards Co. v. U. S. A. and the Secretary of Agriculture** (1935), 298 U. S. 38, 80 Law. Ed. 1032; **N. L. R. B. v. Jones & Laughlin Steel Corp.** (1937), 301 U. S. 1, 81 Law. Ed. 893, at 917.

The following brief considerations are offered to this Court in support of the contention that all the evidence in this case should be considered before the petitioner should be held guilty of unfair practice and drastic penalties assessed.

1. The company was here the unhappy battleground of industrial strife. In the face of the company's lawful demand for a Labor Board election the CIO chose industrial warfare resulting in bitterness and antagonism. The prin-

cipal industries in town were tied up for months. The independent union was born of the strike under conditions where the court might reasonably conclude that the employees, and indeed the locality, were not ready for such stringent measures. The court might reasonably conclude that the Board should have considered these circumstances in insisting upon an almost Prussian discipline on the part of the company's employees.

2. In any case the course of action of the company was in good faith. The settlement which it made should not be outlawed. The company resorted to the Board itself which was fully advised of the facts. This was no secret treaty. The company reluctantly accepted the terms which were imposed and reposed confidence in the Board to adjudicate the question of both bargaining agent and the complaint of employee Dodrill. Its subsequent dealings were with a certified union, and it observed what it considered to be its legal and contractual obligations.

3. The effect of the Board's decision is not only to undermine confidence in the Board's scrupulous regard for contractual agreements, but might well be construed to encourage any militant union to believe that it could go through the motions of making strike settlements and arbitrating the question of representation, and then, if it lost the arbitration, to resort to the Board to set aside the settlement in case of an unfavorable outcome. This is a standard of conduct which is not countenanced by ordinary business and commercial standards. It certainly should not be countenanced by an agency of the United States which is charged with the difficult task of protecting and representing labor unions while retaining the confidence of all groups. These conflicts between economic forces (not always so irreconcilable as they appear to the protagonists) can certainly be resolved without departing from the principles of fair dealing upon which our basic unity depends.

The petitioner, therefore, respectfully submits that the settlement should be upheld and the company exonerated from liability for the harsh results of a union policy reluctantly accepted both by the company and by the Legislature.

Respectfully submitted,

LYLE M. ALLEN,
Attorney for Petitioner.

R. WALSTON CHUBB,
Of Counsel.

October 10, 1944.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

THE WALLACE CORPORATION,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.

No. 66.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

I.

THE PRESENT STATE OF THE ISSUES.

It is notable that the Board has progressively receded from the position which it first took in this case:

Admission No. 1. After the reargument before the Board, the Board admitted that there was no breach of the settlement or election agreements by the employer prior to the election (R. 24). It retreated to the position that the making of the closed shop contract itself, after

the election, was the only unfair practice. Here the Board is squarely up against its own prior action, namely, that the Board had by its certification, required the employer to negotiate with the Independent. The Board itself had participated in the settlement agreement whereby the employer was obligated to make the closed shop contract of which the Board now complains.

Admission No. 2. In its brief before the Court of Appeals, the Board admitted, with respect to the discharge of these employees, that there was no conspiracy between the Independent and the employer in respect to the discharge. The court took notice of this admission on the part of the Board when it said:

> "It would not be fair to the company to say that it conspired with the Independent union to bring about the discharge of troublesome members of the opposite union." (R. 350).

This admission places the Board in great extremity, because, if the discrimination here involved was the sole act of the Independent union and not the act of the employer, the employer cannot be held for unfair practice. As shown below, the Board still argues this case in language which insinuates participation by the company in the discriminatory exclusion by the union, when in fact all the evidence is to the contrary.

Admission No. 3. In its present brief the Board has admitted that a union has control of its own admission policies to the exclusion of interference by the employer.

The Board admits that the courts have never supervised admission policies of unions and cites only one case as casting even any doubt on that question. This is the case of **Cameron v. International Alliance** (1935), 118 N. J. Eq. 11; 176 Atl. 692, where a union's constitution and by-laws were held invalid at the suit of junior mem-

bers of the union, for the reason that junior members could not be bound by a contract which unduly limited their right to dispose of their labor as they pleased. The case has been recognized as a borderline case. See Notes, 19 Minn. Law Review 818. Furthermore, as pointed out by the petitioner in its brief, the case turned on the union's monopoly of labor which there existed, a doctrine since abandoned by the New Jersey courts (Pet. Br. pp. 64, 65).

But the overwhelming authority is that the courts should not interfere in such matters and the Board has itself adopted the same policy. Professor Ralph A. Newman, a former examiner for the Board, in his article on "The Closed Union and the Right to Work," in 43 Columbia Law. Review 42, l. c. 51, says:

> "Control of the rules of admission to labor unions can not be accomplished through the National Labor Relations Act, since according to its terms it is limited to the correction of unfair practices on the part of the employer only. Indeed, the N. L. R. B. since its early history has expressly adopted a hands-off policy as to the internal affairs of labor unions."

The very first annual report of the Board, at page 109, adopted a similar position with respect to jurisdictional disputes between unions and said the following:

> "Self organization of employees implies a policy of self management. The role that organizations of employees eventually must play in the structure established by Congress through that Act is a large and vital one. They will best be able to perform that role if they are permitted freely to work out the solutions of their own internal problems. In its permanent operations the Act envisages cohesive organizations well constructed and intelligently guided."

The point is, we believe, too clear for further argument. And in any case, even if it should be held that the Board

may indirectly supervise unions by denying them privileges under the Act, it certainly would be a departure from the policy of the Act to permit, let alone insist, that an employer should take a position other than a neutral one in such controversies.

II.

THE BOARD FAILS TO MEET AN IMPORTANT ISSUE OF LAW.

The petitioner invites attention to the failure of the Board to meet one vital point of law raised in petitioner's brief, namely, that even if the action of a union in excluding employees from membership is wrongful, the employer cannot be held liable or charged with the duty of reforming the union. Many cases were cited to support this conclusion in Petitioner's brief (pp. 68 to 75). It is an especially important principle where an employer is caught between two rival unions. If there are evils in union practices certainly the employer should not be charged with the task of purifying unionism from such practices.

III.

THE BOARD'S NOVEL ARGUMENT ON CONSTRUCTION OF THE CLOSED SHOP PROVISO.

Neither the closed shop contract in this case nor anything in the wording or policy of the National Labor Relations Act conditions a closed shop upon an open union.

The closed or union shop contract in this case provided: "The company agrees that all of its employees * * * shall be members of the union in good standing" (R. 61, 62). This is an agreement of the company to employ only union members. It does not mean that the union agrees that all the employees of the company shall be members. Can there be any doubt that if an employee of the

company ceased to be a member of a union, then the clause would operate? It operates if an employee does not join. It operates if an employee ceases to be in good standing. It operates if the union expels him. Why should it not operate if the union excludes him in the first place? The clause of the contract conspicuously omits any agreement of the union to admit all employees of the company.

The Board makes a novel argument that the closed shop proviso of the Act permits a union to require everyone to join its union but negatives any notion that the union may exclude employees. The Board's suggestion would redraft the proviso to read: "Nothing in this act shall prohibit a union by agreement with the employer from requiring all the employees to join its union." The proviso does not so read. The subject of the proviso is the employer and the proviso says that an employer may make an agreement with the labor organization requiring as a condition of employment membership therein. A labor union does not prescribe a condition of employment; the employer does the employing. The labor union prescribes membership and the terms upon which membership may be permitted.

The fact that this construction is correct is borne out by the statutory provisions cited in petitioner's brief which supplements the proviso by limiting the right of the union to exclude. The suggested construction by the Board is indeed strained.

The proviso is part of Section 8, which defines unfair labor practices of an **employer** in the first and controlling sentence. It is the action of the employer which is regulated. The reason for the **proviso** is to free the employer from any charge of encouraging membership when he makes membership a condition of employment.

It should be further noted that only **agreements** are permitted. An employer still cannot require an employee to join a union or refrain from joining a union, absent an

agreement. It follows that he cannot insist that a union admit his employees. Furthermore, the first definition of unfair labor practice in Section 8 precludes an employer from interfering with the rights of self-organization or the formation of unions. An employer may not interfere with self-organization by employees or the formation of a union. It follows that he has no right to interfere in prescribing admission policies.

We have never heard it questioned that the Act is designed to encourage collective bargaining. The mandate of the Act requires the Board to encourage collective bargaining. Section 1 declares the purpose of protecting the exercise of full freedom of association. It declares the purpose of encouraging collective bargaining. Section 9-C representation directs the Board in representation matters to determine the unit according to whether the unit will insure to employees the full benefit of their right to self-organization. Last, but not least, the remedies of the Act are directed only against unfair labor practices, and the only person who can commit unfair labor practices as defined by the Act is an employer.

Majority Rule. The Board relies much upon the majority rule. It refers, without citation, to the solicitude of Congress for the minority. Perhaps some members of Congress were solicitous about the minority, but they did not prevail. The Congress resolved the question by providing that the representatives of the majority exclusively should do the bargaining, and we believe that conclusion is generally accepted as correct as far as representation is concerned. As a matter of fact, the only thing Congress did for the minority was to insert a proviso in Section 9-A that "any individual employee or group of employees shall have the right at any time to present grievances to their employer."

We think the answer is too obvious for further argument. The Act was intended to encourage unionism, not to place

limitations upon unionism. We do not quarrel with that conclusion—we only insist upon an honest recognition of it.

Minority Right to Representation. The Board cites, with approval, the opinion of Judge Groner in the "Red Cap" case, **Brotherhood of Railway and Steamship Clerks etc. v. United Transport Service Employees of America** (App. D. C.), 137 Fed. (2d) 847. The union had no right to exclude in that case, because there was no closed shop agreement; so the minority were included in the class or craft. Since the statute gave all employees the right to choose representatives, the minority could not be excluded from the right by arbitrary exclusion from the union. The Court's answer was simple. The minority union should be recognized.

But in the National Labor Relations Act, we have a provision which is absent in the Railway Labor Act: The closed shop proviso, as all agree, permits the exclusion of non-members of the union from the **unit** and from **employment**. The employees are therefore excluded from the very relationship which gives rise to the right of representation. If the argument of the board falls as to the right of representation, it falls alike as to employees who do not choose to join and those who are excluded from membership in the union, for any of the many reasons which might justify such exclusion, including as we contend, adherence to a rival or hostile union.

The Board admits that Congress left to the States the question of the legality of the closed shop. That is not to be doubted. It would seem to follow that the right of the union to exclude should be a matter of state legislation, until the Congress decides to amplify its own definition.

The political analogies suggested by the Board are dangerous. Industrial democracy has not grown apace with political democracy. With recognition and representation only just secured, we cannot expect that the first act which

secures those collective rights, should also contain a bill of rights for the individual and for the minority. We would hope that such a bill of rights would be careful and discriminating. But of one thing we are sure; namely, that if and when the time comes to fashion the rights of the minority and the specifications for the open union, then and in that event, the National Labor Relations Board will be the last to suggest as it does in this case, that it is up to the employer to administer and enforce such rights.

We applaud the suggestion of the Board that unions should be held accountable for their acts. The notion of accountability of the majority to the minority, however, is one which arises only after the membership relationship is established. The notion of trusteeship arises only where the minority are members. The right of a union to exclude under its by-laws is, as above indicated, not limited by the closed shop clause. It is a contradiction in terms to say that a union represents employees who are excluded from the unit by a closed shop agreement.

The authorities which are cited by the Board to indicate that a union may be held accountable and responsible do not touch the question at issue. There is no doubt that unions are bound by the law of the land in many respects. For example, a strike for a closed shop may be enjoined in Massachusetts and Pennsylvania, even though closed shop agreements are valid there. **Erdman v. Mitchell** (1903), 207 Pa. 79, 56 Atl. 327; **Fashioncraft v. Halpern** (1943), 48 N. E. (2d) 1. Unions are bound by many other principles of law.

The cases cited by the Board discussed below are not authority in any particular against the well recognized rule that the Act does not attempt to regulate the affairs of a union. Clearly the cases are not authority for the Board's contention that the Independent, in excluding from membership the employees here involved, deprived the petitioner of the immunity granted it under Section 8 (3) of the Act.

In the matter of **American News Co., Inc.**, 55 NLRB 1302, the Board held that, since the strike was called for the purpose of compelling the employer to effect a wage increase without approval of the National War Labor Board, the striking employees were not entitled to reinstatement.

In the case of **Southern Steamship Company v. N. L. R. B.**, 316 U. S. 31, this Court held that striking employees were not entitled to reinstatement to their jobs where the strike constituted mutiny within the meaning of the Criminal Code.

In the case of **National Labor Relations Board v. Fansteel Metallurgical Corp.**, 306 U. S. 240, this Court held that employees on an illegal strike are not entitled to reinstatement to their jobs.

In the case of **National Labor Relations Board v. Sands Manufacturing Co.**, 306 U. S. 332, it was held by this Court that the National Labor Relations Act does not prohibit an effective discharge of an employee for repudiation by the employee of a term of a collective agreement entered into between employer and a union representing ployees.

These cases cited by the Board have, as stated above, no bearing on the question here presented for decision. The question involved in the American News Company, Fansteel, and the Southern Steamship Co. cases was whether the striking employees remained employees for the remedial purposes specified in the Act. All of these cases concern the attempt of employees who have been guilty of violation of the law or contract to have the Board enforce against an employer the remedial provisions of the Act. They do not suggest that an employer, in addition to the prohibitions of the Act, may be held for the unfair acts of a union.

The freedom to which the Board refers is primarily freedom from employer interference, and the Board is clearly violating "the spirit of the Act" when it penalizes an employer who refuses to interfere to "protect" or dictate to the union in regard to its admission policies. And there is further violation of the spirit of an act which encourages bargaining, for the Board to sponsor a union which repudiates a bargain and even urges the employer to violate his bargain to grant a closed shop.

The Board has undertaken at length to defend the closed shop and points out its many advantages. We do not either defend or condemn the closed shop.* We simply state that it implies and authorizes exclusion.

Self preservation of the union is properly mentioned by the Board as one of the purposes of the closed shop. We are glad that the Board recognizes that there is also this institutional element in the policy. A union wants to get all the work it can for its own members, and this is especially true in times of unemployment. It must see that they are employed first. Selfishly, it may limit output if necessary. It may impose high initiation fees. It may exclude apprentices. It may exclude foreigners. We simply suggest in our brief that it may also protect the union from hostile employees by keeping them out. Undoubtedly there is an element of group loyalty in such a position but there is also group selfishness which ignores the individual.

We submit that an honest consideration of the closed shop policy requires the admission that it does involve discrimination by a union. The union has the right to determine who shall be in the bargaining unit. Non-members cannot get into the unit. If they are already in the unit and fail to join under a closed shop contract, they are out.

*That the general question is still controversial is attested by the fact that three states voted on constitutional provisions in the recent election, to prohibit closed shops; in Arkansas and Florida it was ahead; rejected in California. St. Louis Post-Dispatch, Nov. 9, 1944.

If the union expels them they are out of the unit. The Board would probably admit there are many circumstances under which a union may exclude members, such as default in dues, disloyalty, or dishonesty. Possibly the Courts would permit a union to indulge its own prejudices, such as prejudice against communists or the Ku Klux Klan, or the Chamber of Commerce!

But all of this is beside the point. The real point is that these matters are for unions to decide. They are problems for unions and not problems for employers. The purpose of the Act was to promote the institution of unionism and collective bargaining. If a union thinks that exclusion is necessary to self preservation it certainly is not for an employer to interfere.

IV.

THE BOARD OVERLOOKED THE REAL AND DECLARED MOTIVES OF THE UNION IN EXCLUDING FROM MEMBERSHIP.

Harsh methods breed harsh results. The union in this case kept over 200 employees out of employment for three and one-half months. Even women were on the picket line (R. 136). There were "shooting scrapes" (R. 185, 189). When White and some Independent members tried to get into the plant they were stopped at the gate by fifty to seventy-five members of the C. I. O. (R. 182). Mr. Davis reported stories of hardship and lack of provisions (R. 202). Harvey Dodrill, who is mentioned in the letter of the union as hostile, was active on the picket line (R. 154).

As against this background the Board constantly insists that it was some innocuous advocacy of the C. I. O. on the part of the excluded members and some abstract insistence upon exercise of their statutory rights which led to the exclusion: On page 47 the Board says, with emphasis on the word "because":

"In the instant case a minority group of employees who exercised their right under the Act to sponsor the union in the election campaign was discriminated against and the employees lost their jobs **because** they had exercised that right." (Emphasis the Board's.)

As a matter of fact there is not a scintilla of evidence that the Independent excluded these employees because of any conduct in the election campaign. The election was certified as conclusive and has been approved by the Board itself.

It is entirely possible that reconciliation of these factions was impeded by the questionable action of the Board's agents. When an investigator of the Board sought to get Thompson, the editor of the Nicholas Republican, transferred or fired from his job (R. 108), it must undoubtedly have caused resentment on his part. This circumstance, together with the Board's repudiation of its own certification of the Independent, no doubt contributed to the inflexible position of the Independent.

The Board also refuses to recognize the declared motivation of the Independent as shown by its letter about the closed shop clause (R. 287-9). This letter shows that the Independent was afraid its union would be undermined by its opponents. He refers to the hard fought and hazardous campaign prior to the election. He refers to new employees who were employed who were favorable to the interest of our opponents. The main point of the letter is clear:

"If other similar minded employees are given jobs in your plant it won't be long until our majority of 15 will be either jeopardized or overcome." * * *

"If you continue to hire new employees who are favorable to the interest of our opponents they will be in the majority before long and affiliation with our opponents will probably be their next step." * * *

"The closed shop will therefore give us some control in preventing the hiring of additional employees who are unfavorable to our interests and who would further jeopardize our majority."

It cannot be doubted on the evidence that the underlying motive of the Independent in excluding these employees was the preservation of their own union and distrust of the people it excluded. It cannot be doubted from all the evidence that the employer reluctantly discharged these employees, when they were badly needed, and did so only to avoid further stoppage and because it felt compelled to comply with a contract which the employer had with a certified union.

The Board erroneously assigns the discharge to discrimination by the employer. The Board in its present brief, however, still insists that there was evidence of discrimination on the part of the employer in making this discharge. The most notable disagreement between the Board and the petitioner on this point is with respect to evidence that the employer was advised in some way or knew the extent to which the union had excluded employees. The implication is that the exclusion of thirty-one employees was a drastic step; that if the employer knew it at the time of the discharge, he should have protested more than he did, or else be charged with complicity. It is a sort of indirect charge of conspiracy, which the Board has already disowned.

Now, it is too obvious to discuss that the employer knew of the hostility between the factions. It is not true, as stated by the Board and implied by the court, that the employer knew at the time of the discharge how extreme had been the position taken by the union in excluding thirty-one employees.

The Board misstates (as did the court below) the facts as to the employer's knowledge **at the time of the dis-**

charge of the reasons why the 43 employees had failed to qualify as members. The Board says, pages 33-34 of its brief: "Contrary to petitioner's assertions, there is substantial evidence that at the time of the discharge petitioner had ample reason to believe that the employees had been excluded from membership pursuant to the policy announced by the Independent in its letter to petitioner of February 8, 1942, and that a substantial number of the 43 had actually applied for membership and been rejected." The implication is that the company knew the details to such an extent as to have approved the action. Let us look at the record cited by the Board.

It is admitted that the discharge took place on March 17th. Mr. Wallace was called on the telephone by Mr. Phillips, the Regional Director of the Board, who reported the discharge and Mr. Wallace said he did not believe it, and investigated (R. 278). On March 20th the Board wrote to the company stating that the CIO had filed a charge of discriminatory discharge (R. 298, Respondent Wallace's Ex. 21). He asked in that letter: "We would appreciate hearing from you your version of the facts in the case."

Now, what does the Board cite as grounds for thinking that the company knew that these employees had been excluded by the union: The first citation is R. 287 to 289. This is Thompson's letter of February 28th, above discussed (R. 287), written before the discharge and not indicating that any such drastic steps would be taken.

Record p. 300 is a letter from the Company's Counsel written to the Regional Director on April 13th, almost a month after the discharge.

The next citation of authority is the Record 307-8. This is a letter of March 27th from counsel for the company to the Regional Director in response to his request for the company's version of the facts: "It is my understanding that some of the 39 to whom you refer, let us say 10 of

them, have made no application to join the union, but the balance, let us say 30, had indicated their willingness to join the Richwood union. Membership in the union is beyond the company's control." This is a letter written by the company after investigation of the facts.

The next citation is to R. page 224. This refers to a conversation between Mr. Davis, Superintendent, and Mr. McKay, agent for the Board, **in April**, where Davis said the employees would not work together and he was fearful that if the 40 employees were ordered back to work the other employees would quit. It shows no prior knowledge.

The only other reference is to the brief of the Board at pages 10 to 12 and there are no citations on that page to support the Board's contention that the company at the time it discharged the employees knew the employees had been excluded by the union.

As pointed out, the stipulation in the case (R. 98 to 100) recites the facts about the layoff. This stipulation was requested by the Board at the hearing in June. It says 12 did not apply for membership in the Independent and that 31 were voted down by the membership of the Independent. Its purpose was to avoid calling the witnesses (R. 70) to show the facts which the Board now says were known by the Company.

Dodrill stated at the hearing that all of the discharged employees were members of the CIO (R. 152). **There is no evidence in the record that the company knew this.**

As soon as the company ascertained the facts it took prompt action, under the supervision of the Board, to get the Independent to reinstate these employees. That was all it could do without being charged with interference.

The Board is quite unjustified in claiming that the company was in any way a party to the union's discrimination in the case.

The company frankly admits that it knew of the hostility between the factions. It was only too obvious. The com-

pany admits that it feared, when it made the closed shop contract, that this clause might cause trouble. That was one of the reasons for its reluctance to comply with its agreement to grant a closed shop contract, as Mr. Christmas stated in discussing the negotiation of the contract with the Independent (R. 263, 254).

V.

THE BOARD'S CHANGE OF POSITION ON ESTOPPEL.

In its final point the Board contends that if, in fact, the Independent was dominated, then the closed shop contract is invalid as a matter of law, and that is the end of the case. By making such a point the Board repudiates its prior admissions. The Board admits in the first part of its brief that certain provisions of its orders "can be sustained only if the Board acted properly in going behind the certification," or, again, on page 18, "Since the order can be sustained **in toto** only if the Board is not estopped by agreement or otherwise from resting its decision upon all facts in the case."

In other words, the Board now states that if the Independent was dominated in the fall of 1941, then the settlement agreement in the following January and the closed shop contract in the following March are invalid because of the conditions of the closed shop proviso prohibiting closed shop contracts with dominated unions. On page 72 of its brief the Board says that if it found questionable conduct it was not only permitted but was required "in vindication of the public interest" to examine in June, 1942, the character of the Independent in September or October, 1941.

This amounts to an assertion by the Board that it may renew charges which were withdrawn, and assert the illegality of a settlement which it approved, and repudiate the injunction to the employer to make a contract with the

Independent which it certified. In other words, it may do as it pleases "in the public interest."

The trouble with this position is that while the Board finds in June, 1942, that the Independent was assisted in the preceding September, it had represented by its conduct in January that the union was not dominated or assisted.

Now, let us see how far the elements of estoppel exist in this case. To what extent must the Board now repudiate representations which it made earlier and upon which the employer relied and acted?

First of all, it is notable that the Board does not anywhere deny the authority of its agents to approve settlements or to act as an arbitrator of representation, or to certify a union by consent of the parties. In fact the Board in its brief asserts the recognized custom of the Board's agents to make settlements. "Settlements are generally arranged by the Board's agents working in the field" (Brief p. 21). The practice has been approved by the courts (Brief p. 23). The Board is proud of the extensive use of settlements and the results accomplished (Footnote p. 21).

It should also be noted that the Board does not accuse the employer of concealment or misrepresentation of the facts or of recognizing the Independent prior to the settlement or any fraud whatever.

Now, under those conditions, what representations did the Board make upon which the employer acted and which the Board now repudiates?

1. In January, according to the policy which the Board has announced in its 8th Annual Report (see Pet. Brief p. 28), the Board's agents were presumably "satisfied after considering all the evidence * * * that an election free from all employer compulsion, restraints and interference can be held." The Board had investigated the charge which was withdrawn. (If anything it was the Board

which concealed the facts; its investigator in conference with the employer and its foremen in November, 1941, had refused "to lay his cards on the table" [R. 294].)

2. The Board knew that a closed shop contract would result from the certification which it undertook because that was one of the terms of the settlement. When it undertook to certify it, it represented by its conduct that both unions were eligible for a closed shop contract.

3. The Board has by its conduct admitted that Thompson was responsible for the discrimination. Its agents, after the charges were filed, approached Thompson's employer in order to induce Thompson to act (R. 108). It attempted to induce Thompson's employers to transfer or discharge Thompson as editor of the Nicholas Republican.

4. When the employer, just before the hearing, stated his willingness to re-employ these employees and suggested that the Board and the Independent confer to settle the case, the Board conferred with the Independent as the responsible party and failed to reach an agreement. The employer was not even called into the conference (R. 68-70).

To hold the employer responsible in this case would require this court to say to the Board (1) you may represent to the employer that a fair election can be held and then ignore the election; (2) you can represent to the employer that a closed shop contract will be legal and then call it an unfair practice; (3) you can represent to the employer that a union is a certified bargaining agent and after he has changed his position you can recall your certification; (4) you can act as an arbitrator of representation under a contract between the parties and then repudiate the arbitration. Then the Court adds: In respect to all this conduct when you come before the court, the court will give you the benefit of all doubts by sustaining your finding of facts if any substantial evidence is available to support them.

The employer has but one recourse, namely, to plead abuse of administrative discretion. It relies upon the fundamental principles of estoppel. No one can state a fact even under mistake as to the fact and thereby induce someone else to act upon such fact, and thereafter assert its untruth. That principle should apply in the absence of fraud or conspiracy as in this case. The facts do not permit any charge of concealment or of fraud or willful violation of the act. The settlement was a reasonable one. The employer never recognized either union until the settlement.

It is submitted that the Board's conduct in this case will not permit it to claim that a closed shop contract which it approved was void because of facts which it knew at the time. The Board should not be permitted, after approving a contract which required a closed shop and required the employer to deal with the union, and in effect to make such a contract, to now assert that the employer's compliance with the Board's injunctions and with its own contract is an unfair labor practice. The Board cannot be heard to say that a union which it considered eligible to contract for a closed shop contract is now ineligible, after it certifies that union as an exclusive bargaining agent for the purpose of making a closed shop contract.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 928

RICHWOOD CLOTHESPIN & DISH WORKERS' UNION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

Richwood Clothespin & Dish Workers' Union, petitioner in the above styled proceeding, prays that a writ of certiorari issue to review the decision and decree [1] of the United States Circuit Court of Appeals for the Fourth Circuit entered on February 3, 1944, enforcing an order issued by

[1] The decision and decree were entered in two proceedings:
(1) Case No. 5135, instituted by the Wallace Corporation.
(2) Case No. 5163, instituted by petitioner, herein sometimes called Independent.

National Labor Relations Board and ordering that petitioner abide by and perform the Board's directions contained in the order. [2] A rehearing of the cause, timely filed in said Circuit Court of Appeals, was denied on March 13, 1944.

OPINION BELOW

The opinion of the Circuit Court of Appeals is reported in ..... F. (2) ..... The findings of fact, conclusions of law and order of the Board (T. R. 1-33) [3] are reported in 50 N. L. R. B. 138.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on February 3, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act (hereinafter called the Act).

QUESTIONS PRESENTED

1. In September, 1941, a strike was called at The Wallace Corporation's plant at Richwood, West Virginia, by the CIO Union. In October, 1941, the Independent was organized and sought and was denied recognition as the exclusive collective bargaining agency. The CIO filed charges with

[2] A stipulation has been filed regarding the printed record for purposes of the petition for writ of certiorari.

[3] "Tr." refers to the typewritten transcript of the testimony on file with the Clerk of this Court; "R." refers to "Transcript of Record" printed and filed.

the Board of employer's sponsorship of Independent. On January 13, 1942, the employer and the two competing labor unions entered into a written agreement wherein it was agreed that work should be resumed pending an election by the Board to determine which union represented a majority; and upon CIO's insistence, first, for a closed shop, and, then, for a union shop, the employer agreed that "if either union is proven to represent a majority * * * it will recognize a Union Shop * * *." On January 19, the two unions entered into an agreement for consent election, and also an agreement whereby CIO requested withdrawal of its charge of unfair labor practices, both of which were approved by the Board's regional director; the election was conducted by the Board, in which Independent received more than a majority of the votes cast, and no objection being made to the conduct of the election, the Independent was certified to have been selected as the exclusive bargaining agency. Thereafter, the business agent for the Independent demanded of employer a closed-shop agreement as a means of disposing of "any present employees * * * whose presence in the plant is unfavorable to our interests, because those who are so unfavorable will not be permitted to become members of our organization and without such membership they would not be permitted to work under a closed-shop contract * * *." Thereafter, on March 7, 1942, the employer and Independent agreed upon a contract containing, not a closed shop clause, but a union shop provision in accordance with the tripartite agreement of January 13, requiring Independent membership as a condition of employment. Thirty-one employees sought but were denied Independent membership and were laid off. Twelve others were laid off who did not apply for membership. The Board then issued its complaint, alleging the employer had violated the Act, charging the contract was

illegal and void since it was made with a labor organization assisted by unfair labor practices. One question presented is whether, as the Board determined, and the lower Court approved, the contract falls outside the proviso to Section 8 (3) of the Act and therefore affords no protection to the lay off of the employees as aforesaid. Petitioner asserts the lower Court erred in so holding.

2. Whether, as Petitioner contends, the lower Court erred in holding that the Board may re-open and vitiate a strike settlement agreement, set aside an election conducted by it and its certification thereon, and vitiate a working agreement entered into pursuant thereto, where there is no showing of fraudulent conduct, imposition on the Board, or violation of the settlement agreement by the parties to the working agreement and in holding that the Board may consider events antedating the settlement agreements.

3. Whether, as Petitioner contends, the lower Court erred in holding that the Board was warranted in finding that the employer dominated and interfered with the formation and administration of Independent and contributed support to it.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

STATEMENT

On June 7, 1943, the Board issued its Decision and Order (T. R. 1-33), wherein it found that the employer had dominated and interfered with the formation and administration of, and contributed support to this petitioner; that

the contract of March 7, 1942, "falls outside the proviso to Section 8 (3) of the Act" and ordered employer to cease giving effect to the contract; ordered reinstatement of forty-three employees to their former or substantially equivalent positions and ordered the disestablishment of this petitioner as the bargaining representative of any of the employees of said employer for purposes of collective bargaining.

Petitioner filed in the court below a petition to review and set aside the Board's order. The Board answered, requesting enforcement of its order. On February 3, 1944, the Court filed its opinion, and decreed enforcement of the Board's order. The Court held further that the Board, in effect, could consider the events as antedating the settlement agreements of January 13 and 19.

The facts as they concern the respective issues are as follows:

1. *Facts relating to the contract of March 7, 1942.*

During the summer of 1941, Local Union 129, United Construction Workers Organizing Committee (hereinafter called "Union" or "CIO") instituted an organizational campaign among the employees of The Wallace Corporation (hereinafter called "employer") at its Richwood, West Virginia, plant. About the middle of September, 1941, it demanded recognition as the exclusive collective bargaining agency for the employees. The Union refused to adopt any of the three methods offered by the employer for determining whether Union had a majority; and on September 25, the Union called a strike at the Richwood operation.

In October, 1941, a group of employees organized the

Independent, and on the 14th day of that month requested employer recognition of it as the collective bargaining agent for the employees. This request was denied. Meanwhile Union had filed charges of unfair labor practices against employer. Despite the fact that Independent had filed with the Board a petition for certification, on November 3, 1941, employer's president and vice president and treasurer, met with a representative of the Board in Richwood to which the Board's representative refused to invite Independent representatives. (Tr., 920-972). Board representative had talked with Union people and "some of our employees" and had concluded that Independent was company dominated and proposed an election on condition that Independent would be "out of the picture." (Tr. 919-920). On February 12, 1942, Wallace invited all employees to return to work. The following day, the employer and the two labor organizations met and signed an agreement which provided, in part, for the immediate resumption of operations at the plant, for the conduct of a Board election to determine which, if either union, should be certified, and further that

> "The company further agrees that if either union is proven to represent a majority of its employees by said vote, it will recognize a Union Shop, providing that the Company shall at all times retain the right to suspend, hire or discharge any employee for proper and just cause."

Union representatives had contended for a closed shop (Tr. 959) and the union-shop provision resulted from the insistence of Union representative Fatmer. (Tr., 978).

On January 19, 1942, the same parties entered into two additional agreements: (1) providing for the settlement

and withdrawal of the pending charges of unfair labor practices; and (2) designating both labor organizations as candidates in an election to be held on January 30, 1942. These agreements were approved by the Board's Regional Director, and the case involving the charges of unfair labor practices was closed.

In the election of January 30, conducted by the Board, a majority of the employees selected Independent. No objections were filed to the conduct of the election and the Board certified the Independent as the exclusive bargaining representative of the employees at the Richwood plant.

Following certification, the employer and Independent entered into negotiations for a working agreement. Under date of February 28, 1942, B. E. Thompson, business agent for the Independent, directed a letter to employer's vice president and treasurer wherein he insisted upon a closed shop, stating in part, that

> "The closed shop will, therefore, give us some control in preventing the hiring of additional employees who are unfavorable to our interests and who would further jeapordize our majority. It would also provide us with a legal means of disposing of any present employees, including Harvey Dodrill, whom our members have declared by unanimous ballots that they will not work with, whose presence in the plant is unfavorable to our interests because those who are so unfavorable will not be permitted to become members of our organization and without such membership they would not be permitted to work in the plant under a closed shop contract. * * *."

Inclusion of a closed shop clause in the first draft of the

agreement (Tr., 954) was opposed by the employer. Thompson testified he had harsh words with both Davis, employer's manager, and Wallace about the provisions, and the contract dated March 7, 1942, contained, not a closed shop provision but a union-shop clause instead, and provided that all present and future employees eligible for membership "shall become members" of Independent within ten days from the date of the contract or date of hiring, as the case might be. On March 7, the contract was posted in employer's plant; and on March 16, employer posted another notice that pursuant to the contract, only members in good standing in the Independent could continue to be employed on and after March 18, 1942. On that date forty-three employees were laid off. Of that number twelve did not apply for membership in Independent. The remaining thirty-one applied for membership therein but "their applications were voted upon by members of said organization in the regular manner as provided by the constitution and by-laws of said organization but said applications did not receive the required number of votes to permit them to become members therein." (Tr., p. 254, 255, 264, 265, T. R. 122).

The employer undertook to have Independent take such steps as were necessary to put back to work those employees so laid off. Independent refused; and the complaint, which is the basis of this proceeding, followed.

2. *Facts relating to issue whether the employer had dominated and interfered with the formation and administration of, and contributed support to, the Independent.*

According to testimony offered by the Board to substantiate its finding that Independent was company-sponsored

and dominated; a meeting of the employees was scheduled to be held on October 2 at the home of a foreman who, on the night of the meeting, met the employees on a street corner and adjourned the meeting to the home of Mrs. Lundy Groves, an employee; that when the employees assembled at the Groves' home, Mrs. Groves telephoned Mrs. Irene Groves (called Weese in the Board's decision), secretary to employee's plant manager Davis, for assistance in organizing the group as the nucleus of a labor organization; that Weese recommended B. E. Thompson,[1] a local newspaper editor. Thompson denied that Weese communicated with him with reference to the meeting, and stated positively that Weese made no request that he attend it. Thompson, experienced in union affairs and business agent for another independent employee's labor organization in Richwood (T. R. 380) attended the meeting and became, and acted as, Independent's business agent until on May 15, 1942, when he disassociated himself therefrom because a representative of the Board had advised Thompson's employer (Tr. p. 1016) that the Board was going to prefer unfair labor charges against his employer and suggested that Thompson, not only disassociate himself from the Independent but from Richwood as well, and that as a condition of withholding the complaint against Woodyard Publications, Thompson had to be either discharged or transferred to some other location. (Tr. pp. 274, 280; T. R. 126-131).

The testimony of Board's witness, Mrs. Pearl Stewart, typifies the basis employed by the Board to reach its conclusion and to assert its factual finding. She testified (T. R.

[1] The Board's complaint named Thompson as one of the respondents. In its decision and order the complaint was dismissed as to Thompson (T. R. 29).

p. 382, 383) that she and some other girls saw Clark Gibson talking to Independent members on the street and that the girls turned and went to the home of Mrs. Verdie Groves where, admittedly, the first meeting was held; but when the Trial Examiner propounded to her the next question, "Could you overhear anything that was said between them and this Gibson?", she responded, "No, I did not." Mrs. Mabel Hinkel, testified that Mrs. Lundy Groves, after the Independent's meeting had been held, said that such meeting was to be held at Clark Gibson's home but that his house was filled and the meeting had to be held at Mrs. Groves'. Mrs. Hinkel herself had not been at the meeting, had not heard Clark Gibson make any statement concerning the meeting, and simply attempted to mouthpiece Mrs. Lundy Groves purported statement to her.

Carm Reese was selected as president of Independent while he and Lundy Groves became members of the Board of Directors. The Board charged that they, and Aneil Smith, were a part of the management and therefore their conduct was attributable to employer.

All three of these employees were paid on an hourly basis and were without authority to hire and fire and could not discipline other employees. At the time of the strike the sawyer and saw filer, employees in the mill-room, wherein Reese was an oiler, received higher rates of pay than did Reese. Groves' job was to keep the machine in the clothespin department in operation. His job was termed "a setup man" and consisted of "grinding and adjusting cutting knives." If the machine became faulty, the girl operating it had the authority to tell Groves to repair it (T. R. 386, 387), and he, in turn, could direct her to another machine because "It is to their advantage to keep working." After the strike

Groves held the same position he had when the strike was called, and received no pay increases other than general increases (T. R., 387). Ancil Smith is a setup man in the wood dish department. He receives the same pay which another setup man in the same department receives; and neither has any authority (T. R. 388, 389).

Reese, Groves and Smith punch time-clocks. A. F. Davis, employer's manager, testified (T. R., 392) that by reason of seniority Groves "might be regarded as a temporary foreman in the absence of the regular foreman," and the same basis—seniority—results in others being considered as temporary foremen. According to Davis, a CIO leader, Mike Goheen, performed the same kind of work which Groves and Smith performed, except in different departments, and that Goheen received the highest hourly rate of pay in his department. In Footnote 17 of the Board's opinion (T. R., 13), the Board states that "Other employees who belong to the Union (CIO) act as temporary foremen, but, so far as appears, they were only rank and file Union members." Admitting that these three employees had no authority with respect to hiring or discharging employees, the Board nevertheless found that they were identified with the management because "The machine operators regarded them as assistant bosses or assistant foremen." Footnote 17 Board's Decision and Order (T. R., 13).

REASONS FOR GRANTING THE WRIT

The first two of the issues presented under the heading "Questions Presented" involve questions which, to the present time, have not been the subject of written decision by this Court and are of substantial public importance.

I.

The first question presented is whether the contract of March 7, 1942, falls outside the proviso of section 8(3) of the Act. Upon passage of the Act, as now, the right of labor unions to determine the constituency of its membership had judicial approval. *Mayer* v. *Journeymen Stonecutters' Assn.*, 47 N. J. Eq. 519, 20 A. 492; *Murphy* v. *Higgins*, 12 N. Y. S. (2) 913; *Miller* v. *Reuhl*, 2 N. Y. S. (2) 394 (1938); *Greenwood* v. *Building Trades Council*, 71 Cal. App. 159, 233 P. 283; 1 Teller, Labor Disputes and Collective Bargaining, 287. The effect of the Board's order and the decision of the lower Court is to circumscribe, if not entirely vitiate, this juridically-sanctioned right which is of vital interest to all labor organizations. [4A]

At the outset, it is noted that the limitations imposed by the Act upon unions in the matter of entering into closed-shop agreements do not include the limitation of membership selection. This is clear from the language of the proviso [5] and from the statements of Senator Wagner both upon introduction of the Act and thereafter. [6] Moreover,

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[4A] The Court's position that there is no Court or Board control over union membership is negatived by imposition of duty upon employer, committed to union shop, to insist upon provisions protective of minority's rights. In practical result, the opinion permits employer control which is violative of the Act, and further, such control is accomplished through Board order and the judicial process enforcing it. Illustrative thereof is instant case.

[5] See Appendix.

[6] "Equally erroneous is the belief that the bill creates a closed shop for all industry. * * * Far from suggesting a change, *it merely preserves the status quo.*" (Italics supplied.) Congressional Record, Vol. 79, pt. 3, p. 2332, 73d Cong., 1st Session. "The virulent propaganda to the effect that this bill encourages the closed shop is outrageous in view of the fact that *in two respects it actually narrows the now existing law.* * * * In the first place, while today an employer may sign a closed-shop contract even with a minority group, the bill provides that he shall be allowed to negotiate such an agreement only with an organization which represents the majority. * * * Secondly, the bill is extremely careful to forestall the makings of closed shop agreements with unions that are interfered with or dominated by the company * * *." Idem, p. 7570.

certification of Independent as the exclusive bargaining agency by the Board, after it had permitted the withdrawal of complaint charges in January, stamped the Independent as a union fulfilling the legal characteristics, set forth in the proviso, of a union with which a closed-shop contract might be consummated. That encroachment upon the hitherto unqualified autonomy of a labor union lies with the legislative branch is reflected by statutory enactments in several of the states, providing against discriminatory rules of admission to unions. See Note, 53 Harvard Law Review, 500, 501; Wisconsin Stat. (1939, c. 57,) § 111.06 (1) (c); Pa. Stat. Ann. (Purdon, tit. 43 §211.6 (1) (c); Kans. Laws (1941) c. 265. Likewise, in *Miller* v. *Reuhl*, supra, the court concluded that the legislature's "failure to do so must be accepted as the present expression of public policy and therefore an indorsement of the view * * * that an applicant for membership cannot force his way into the union against the negative vote of the union." The matter of such policy, the omission of limitation upon the membership selection in the proviso; and the inclusion thereof in state statutes are matters which the lower court's opinion does not discuss.

There is no contention of collusive conduct between employer and Independent in relation to the union shop provision in the contract of March 7. The letter which Thompson wrote to the employer followed the date when the tripartite settlement agreements had been made and the election conducted. The lay-off of the employees which is the basis of this controversy stemmed from the tripartite agreement of January 13 when the obligation of the employer became fixed and required it to provide a union shop. The lower Court fell into error when it stated that the union shop meant

"that the employees of the company would be re-

> quired to become members of the successful union as a condition of retaining their employment, not that the successful union might have discharged from employment those who had been on the opposite side of the dispute even though they were willing to become members, by the simple device of denying them membership"

so far as the negative portion of the definition is concerned. There is nothing in the record which justifies any definition of the term "union shop" than that which is generally accorded it.[7] There is nothing upon which even an inference may be established that either union signatory to the settlement agreement intended that there should be a waiver of its right to determine who should be admitted to membership. The knowledge which came to the employer in Thompson's letter did not alter the situation which existed at the time of the tripartite agreement, because the employer's obligation was fixed and, further, the union's right to exclude existed.

The lower Court stated that the Act was never intended to authorize the majority to discriminate against a minority because of prior union or anti-union activities. The Act, it is submitted, deals with employer discrimination not with union discrimination.

Rutland Court Owners, Inc., 44 N. L. R. B. 587, 46 N. L. R. B. 1040, and *Matter of M. Henri Wines, Ltd.*, 44 N. L. R. B. 1310, relied upon by the Board and the lower Court, are not controlling because, in each, there was lacking the legal obligation of the employer to enter into a contract requiring a provision under which applicants might be rejected. Also lacking was an agreement to which the complaining union

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[7] "Under the union shop non-members can be hired, but to retain employment must become union members after a certain period." How Collective Bargaining Works (Twentieth Century Fund), p. 24, Note 41.

had left its signature and the Board its approval. Moreover, the issues were different from the instant one.

II.

Of public importance, also, is the lower Court's approval of the Board's consideration of the events which occurred prior to the settlement agreements. In fact, the Court's opinion indicates its approval even though the employer's conduct did not constitute an unfair labor practice.

The parties to the settlement agreements in executing them, and the Board in approving them, unquestionably regarded their execution as the settlement of the controversial issues over which there had been disagreement for some time. One of such issues was the charge, made by CIO, that the employer had sponsored the Independent, and in this charge a Board agent lent encouragement. The effect of the lower Court's approval of the Board's review of the issues thus settled is to say that one party to the agreement is bound by the contract only if it is successful in obtaining a majority vote. The Court stressed the point that the Board is required to perform its duty. That requirement is appealing; but since the Board was fully informed it should not now be permitted to assume a position inconsistent with its approval and conduct, particularly where others have acted in reliance thereon. In *Hazel-Atlas Glass Co.* v. *N. L. R. B.*, 127 F. (2) 109 (1942), CCA 4, the Court gave full faith to a settlement agreement and held that violations of the Act which were the subject of the settlement agreement had little significance because of the agreement which had Board approval. In *N. L. R. B.* v. *Appalachian Electric Power Co.*, 140 F. (2) 217 (1944), recognition of Board certification

was required of an employer to avoid "litigious bedlam and judicial chaos." Certainly the Board should be held to its own certifications for the same reason. Agreements between an employer and opposing unions have become an integral part of the Board's procedure for determining bargaining representatives.[8] Litigants before the Board should not be placed in a position where they cannot feel, with security, that there is finality to their agreements. The language of the Court in *N. L. R. B.* v. *Sun Shipping & Dry Dock Co.*, 135 F. (2) 15, CCA 3, is peculiarly appropos in the instant proceeding: "***After all, the fundamental purpose of the Act is to secure to employees entitled to its protection the right to bargain collectively through representatives of their own choosing. Obviously, therefore, once a majority choice has been competently polled and authoritatively certified, it is not to be avoided lightly. Otherwise the employees' right may actually be infringed and the purpose of the Act thereby thwarted."

III.

It is submitted that there is no competent legal testimony to support the conclusion that Gibson, a foreman, associated himself with a group of employees who participated in the formation of Independent. The testimony of Mrs. Stewart (T. R., 382, 383) and the hearsay testimony of Mrs. Hinkel, are substantial to support the Board's finding and does not meet the test of sufficiency of testimony necessary to uphold the Board's finding. *N. L. R. B.* v. *Asheville Hosiery Co.*, 108 F. (2) 288, 292, CCA 4; *Consolidated Edison Co.* v. *N. L. R. B.*, 83 L. ed. 126, 140. In finding that Weese

[8] Eighth Annual Report, N. L. R. B., p. 52.

was identified with management so far as the validity of petitioner is concerned, the Board erred. See *Cupple's Co. Mfgrs. v. N. L. R. B.* 106 F. (2) 100, CCA 8; *N. L. R. B. v. Poultrymen's Service Corp.*, 138 F. (2) 201, CCA 3.

The Board was in error also in holding that the activities of Reese, Groves and Smith in connection with the formation and administration of Independent were attributable to the employer, since there is no evidence that these employees "were emulating the example set by the management." *International Assn. of Machinists v. N. L. R. B.*, 311 U. S. 72. See also *Magnolia Petrolgum Co. v. N. L. R. B.*, 112 F. (2) 515, CCA 5; in which a sub-foreman had been elected a temporary president of an independent union, and his activity was relied upon as one evidential fact to prove company domination and interference. The Court said, "Thus, by its finding, the Board denies to Barton the very right the statute gives him, of action with his fellow-employees for self-organization." See *N. L. R. B. v. Shank Products*, 108 F. (2) 872, CCA 3. The conclusion as to these three employees is likewise contrary to a Board decision involving the Cherry River Boom & Lumber Co. 44 N. L. R. B. 273, in which there was testimony that employees regarded yard graders as "bosses" yet the Board said, "Although several employees who worked as lumber handlers testified that they considered yard graders to be 'bosses' and representatives of the management, the evidence, in our opinion, does not support the finding of the Trial Examiner that they are generally so regarded by respondent's employees."

Attention must be paid to the fact that Independent may not be charged with employer's attitude or alleged anti-union statements by its supervisory employees prior to the organi-

zation of Independent. The lower court's opinion does not take this into consideration.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

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April, 1944.

APPENDIX

National Labor Relations Act (Act of July 5, 1935, ch. 372, 49 Stat. 449).

Rights of Employees

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

* * *

SEC. 8. It shall be unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C. Supp. VII, title 15, secs. 701-712) as amended from time to time, * * * shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in this Act as an unfair

labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice,***

* * *

(f) * * * the findings of the Board as to the facts, if supported by evidence, shall * * * be conclusive.

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OCT 13
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

NO. 67

RICHWOOD CLOTHESPIN & DISH WORKERS UNION,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

UPON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON BEHALF OF RICHWOOD CLOTHESPIN & DISH WORKERS UNION

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UPON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON BEHALF OF RICHWOOD CLOTHESPIN & DISH WORKERS UNION

JURISDICTION

Upon complaint (R. 31) issued by National Labor Relations Board (hereinafter called "Board") on June 25, 1942, that the Wallace Corporation (hereinafter called "employer" or "company") and B. E. Thompson[1] had engaged in unfair

[1] The complaint as to Thompson was dismissed. (R. 28).

labor practices in violation of Section 8 (1), (2) and (3) and Section 2 (6) and (7) of National Labor Relations Act, following charges filed by Local Union No. 129, United Construction Workers Organizing Committee (hereinafter called either "Union" or "CIO." The Board, after hearing and argument, issued its decision and order (R. 1) wherein it found that employer had dominated and interfered with the formation and administration of, and contributed support to, Richwood Clothespin & Dishworkers Union (hereinafter called "Independent"), which had intervened in the hearing of the complaint charges, and that a contract between it and the employer dated March 7, 1942, "falls outside the proviso to Section 8 (3) of the Act," and, among other matters, ordered reinstatement by the employer of forty-three employees to their former or substantially equivalent positions, and also ordered the disestablishment of Independent as a representative of any of the employees of employer for designated collective bargaining purposes.

Upon petition for review filed in the United States Circuit Court of Appeals, Fourth Circuit, that Court entered a decision and decree on February 3, 1944, enforcing the order issued by the Board and ordering that Independent abide by and perform the Board's directions contained in the order. A rehearing of the cause (R. 372, 374), timely filed, was denied on March 13, 1944.

Jurisdiction of this Court was invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Sections 10 (e) and (f) of the National Labor Relations Act. [29 U.S.C.A. 160 (e) and (f).]

OPINIONS BELOW

The decision and order of the Board is reported in 50 NLRB 138. The opinion of the Circuit Court of Appeals is reported in 141 F. (2d) 87.

STATEMENT OF THE CASE

1. PROCEEDINGS BEFORE THE BOARD

A. THE PLEADINGS[2]

As heretofore noted, the Board issued its complaint charging, in substance, that employer had interfered with and discouraged its employees in its plant situate at Richwood, West Virginia, with respect to membership and activities in the Union and that employer had sponsored the formation of, and dominated Richwood Clothespin & Dish Workers' Union and encouraged membership therein and had contributed to its support; and that on or about March 18, 1942, employer, purporting to act pursuant to an alleged agreement between itself and the Independent discharged and thereafter refused to reinstate forty-three named employees because of membership in Union and because of their non-membership in the Independent; and that said contract of March 7, 1942, was illegal and void since it was made with a labor organization assisted by unfair labor practices and not the representative of the employees pursuant to Section 9 (a) of the act.

[2] These pleadings appear in the record on pages as follows: Complaint, R. p. 31, 38; Independent's Answer, R. p. 313; Board's Decision and Order, R. p. 1.

Independent's petition to intervene was granted in so far as its interests were affected by the proceeding. Independent, employer and said Thompson filed separate answers to the complaint in each of which the charges were denied, and likewise each moved to dismiss the proceeding. (R. 285).

Independent's answer (R. 313) alleged, in part, the following:

"That the said Local Union No. 129, United Construction Workers, Organizing Committee heretofore filed another unfair labor practice charge against the said Wallace Corporation, but that said charge was later withdrawn and a consent election held under the direction of the National Labor Relations Board for the purpose of enabling the nonsupervisory employees of The Wallace Corporation at Richwood, West Virginia, to determine by secret ballot their exclusive collective bargaining agency, if any they desired; that pursuant to agreement between The Wallace Corporation, the employer, Local Union No. 129, United Construction Workers Division of District 50, United Mine Workers of America, and the Richwood Clothespin and Dish Workers Union, a Corporation, an independent employees' union composed of nonsupervisory employees of The Wallace Corporation, of Richwood, West Virginia, with the consent and approval of Philip G. Phillips, Regional Director for the National Labor Relations Board, Ninth Region, the said Richwood Clothespin and Dish Workers Union aforesaid was thereby recognized as a labor union within the meaning of the National Labor Relations Act and placed upon the ballot to be used at said consent election, together with that of the Local Union No. 129 aforesaids; that at the election so held the said employees chose as their exclusive collective bargaining agency the said Richwood Clothespin and Dish Workers Union; that the re-

sult of said election was properly certified to the National Labor Relations Board as provided by law, and such organization was thereafter officially declared and recognized as the exclusive bargaining agency of the employees aforesaid; and acting under authority conferred by the National Labor Relations Act, said Richwood Clothespin and Dish Workers Union entered into a working agreement with The Wallace Corporation concerning wages, hours of labor and conditions of employment, which said contract is now in full force and effect; that pursuant to authority conferred by the said National Labor Relations Act a union shop provision was included in said working agreement; that the persons named in Paragraph 11 of the complaint aforesaid and alleged to have been discharged by The Wallace Corporation because they were members of the United and because they were not members of the Independent, were, in fact, discharged by virtue of said union shop provision as a result of their not being members of the said Richwood Clothespin and Dish Workers Union; that one of the provisions of the agreement whereby the said election was held related to a union shop provision and that the said Local Union No. 129 refused to agree to such consent election unless it was stipuated that in the event that the said Local Union No. 129 should be chosen as the exclusive bargaining agency for said employees, that a union shop provision would be inserted in the working agreement requiring all employees of the said Wallace Corporation to be members in good standing of said Local No. 129; that having withdrawn the original unfair labor practice charges and having admitted the legality of the Richwood Clothespin and Dish Workers Union as a labor union and having insisted upon a union shop provision prior to the election aforesaid, the said Local No. 129 and the National Labor Relations Board are now estopped from questioning the validity of said election, the validity of the

Richwood Clothespin and Dish Workers Union or the contract made by it with The Wallace Corporation pursuant to its selection as the bargaining agency by the Wallace Corporation employees in the election aforesaid."

B. *Decision and Order of the Board.*

February 27, 1943, the Board issued its Decision and Order which on May 1, 1943, it vacated and set aside and directed reargument. That order was signed only by Harry A. Millis, Chairman of the Board, while Member Gerard D. Reilly concurred in the Decision and Order but employed reasoning different from that of Chairman Millis. Employer, Union and Independent participated in the reargument, and under date of June 7, 1943, the Board again issued its Decision and Order wherein, among other things, it found that the employer had dominated and interfered with the formation and administration of, and contributed support to, the Independent; that said contract between it and the employer dated March 7, 1942, "falls outside the proviso to Section 8 (3) of the Act" and ordered reinstatement of the forty-three employees to their former or substantially equivalent positions and ordered disestablishment of Independent as a representative of any of the employees of said employer for enumerated collective bargaining purposes.

2. DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The decision and decree[a] of the Circuit Court of Appeals for the Fourth Circuit entered on February 3, 1944, enforced

[a] The decision and decree were entered in two proceedings for review: (1) Case No. 5135, upon petition for The Wallace Corporation. (2) Case No. 5163, upon petition of Independent. See Record, pp. 352, 371, 345.

the order of the Board and directed that Independent abide by and perform the Board's directions contained in said order. A rehearing (R. 372, 374), timely filed in said Court, was denied on March 13, 1944.

The Circuit Court of Appeals, in its opinion (R. 345), inter alia, invalidated the agreement of March 7, 1942, between employer and Independent, and justified its ruling on the factor that employer had knowledge of Independent's intention to deny membership in Independent "when it (employer) knew that they were denied membership because of prior union activities." The opinion of the Court likewise declares the discharge of employees, pursuant to the contract, was an unfair labor practice and justifies the Board in going fully into the question of company domination, notwithstanding the agreements of January 13 and January 19, the election conducted by the Board, and its certification of Independent as the exclusive collective bargaining agency. It likewise, summarily and without analysis of the evidence in its opinion, justifies the Board's factual conclusion of employer sponsorship and domination of Independent as an organization.

3. STATEMENT OF FACTS

(1.) RELATING TO THE CONTRACT OF MARCH 7, 1942.

In September, 1941, following an organizational campaign by the Union among the employees of employer at its Richwood, West Virginia, plant, the Union called a strike. Demand for recognition as the exclusive collective bargaining agency was made upon employer, whose President, Mahlon B. Wallace, Jr., was offered three methods of de-

termining whether the Union had a majority, namely: an election conducted by the Board; a card count; and determination by three ministers of the employees' choice. Wallace chose the Board election. The Union then refused. (R. 270, 271). The strike followed.

In October, 1941, a group of employees organized Independent. (R. 89). The history of the organization of Independent is not a part of the record except insofar as the Board, by the grossest type of hearsay testimony, has attempted to show that it is company sponsored and dominated. The Board's evidence on the issue of company sponsorship, aid and domination of Independent are detailed under heading "2. Relating to Issue of, Employer Sponsorship, Domination of, and Aid to, Independent." It suffices at this point to state that on October 14, 1941, the Independent requested employer recognition as collective bargaining agency for the employees, but meanwhile the Union had filed charges of unfair labor practices against the employer. Independent's request was not granted and by petition then filed with the Board, it sought certification as the bargaining agency pursuant to Section 9 (c) of the Act. (R. 292).

On November 3, 1941, Wallace and William T. Christmas, employer's Vice-President and Treasurer, met with a representative (Russell R. Miller) of the Board in Richwood, together with employer's foremen and representatives of the Union. Independent representatives had not been invited, and, in fact, Miller specifically refused to have them called in for interview. (R. 272, 248). According to Christmas' testimony, which is not contradicted, Miller stated that from information given him in Charleston by Union people and "some of our employees", he (Miller) had concluded that Independent was company dominated (R. 918), and pro-

posed a Board election (to which the Union had agreed) on condition that Independent would have to be "out of the picture". (R. 248).

The strike continued until January 13, 1942, when the plant reopened. On the preceding day, Wallace and Christmas had come to Richwood for the purpose, as explained by Christmas, that "the plant had been closed for about fifteen weeks, and it was a question of just what we had to do something, we were about to lose all of our customers." (R. 261). They met with the Richwood Federation (Chamber of Commerce). (R. 272). Wallace stated that "after talking to the Independent group, who apparently wanted to work, and to the townspeople, I decided to open up." (R. 273). All employees were invited to return. (R. 252, 260). Thereafter a meeting took place between Independent and Union at which the latter claimed that Wallace had agreed with it to have a yes or no vote on selection of Union. A delegation of Independent, including Carm Reese and Lundy Groves, called upon Wallace to determine the verity of that statement. Wallace denied having made it. (R. 274).

On January 13, 1942, the employer and the two labor organizations executed an agreement (R. 54), wherein it was agreed that work should be resumed pending an election by the Board to determine which, if either, of the unions represented a majority, and was entitled to certification as the collective bargaining agency and that "the company further agrees that if either union is proven to represent a majority of its employees by said vote, it will recognize a Union Shop, providing that the Company shall at all times retain the right to suspend, hire or discharge any employee for proper and just cause." Union representatives contended for a closed shop. (R. 276).

On January 19 following, the two unions and the employer entered into another agreement, which provided for a consent election to be held under the supervision of the Board on January 30, 1942. (R. 56). Another agreement between employer and Union provided for the settlement and withdrawal by Union of charges it had theretofore filed with the Board charging company sponsorship and domination of Independent. (R. 53). The case involving such charges was closed and the agreements entered into were approved by the Board's Regional Director, Phillip G. Phillips. (R. 51, 59). The election held by the Board as scheduled, resulted in the selection of the Independent by a majority of the employees. (R. 18, n. 31). No objection being made to the conduct of the election, Independent was certified by the Board to have been selected as the exclusive collective bargaining agency of employer's employees at the Richwood plant. (R. 18).

Shortly thereafter the employer and Independent entered into negotiations for a working agreement. B. E. Thompson, business agent for Independent, under date of February 28, 1942 (R. 287), directed a letter to Christmas in which he insisted that Independent must have a closed shop. The letter read, in part, as follows:

> "The closed shop will, therefore, give us some control in preventing the hiring of additional employees who are unfavorable to our interests and who would further jeopardize our majority. It would also provide us with a legal means of disposing of any present employees, including Harvey Dodrill, whom our members have declared by *unanamous* ballots that they will not work with, whose presence in the plant is unfavorable to our interests because those who are so unfavorable will not be permitted to become members of our organization and without such member-

ship they would not be permitted to work in the plant under a closed shop contract which we respectfully insist we MUST have."

The first draft of the agreement contained a closed shop clause which the employer opposed, as it did other provisions therein (R. 263, 277). Thompson testified that he insisted upon a closed shop "but eventually modified it to a union shop". (R. 110). Thompson had harsh words with both Davis, employer's General Manager at the Richwood plant, and Wallace about it. (R. 112). According to Wallace, he wanted to "have it kicked out altogether." (R. 277).

On March 7, 1942, the employer and Independent agreed upon a contract containing, not a closed shop clause, but one by which it was provided that all present and future employees eligible for membership "shall become members" of Independent within ten days from the date of contract or date of hiring, as the case may be. (R. 61). The posting of the contract in employer's plant was effected on March 7. On March 16, employer posted a notice that pursuant to said contract, only members in good standing in Independent could continue to be employed on and after March 18, 1942. Thirty-one employees sought but were denied Independent membership and were laid off. Twelve others, none of whom applied for membership, were likewise laid off. As to the thirty-one denied membership, the record shows that "their applications were voted upon by members of said organization in the regular manner as provided by the constitution and by-laws of said organization but said applications did not receive the required number of votes to permit them to become members therein." (R. 98, 103). Efforts of the employer to have Independent take the steps necessary to put back to work those employees so laid off were unavailing and the Board then issued its complaint, which is the basis of this proceeding.

(2) FACTS RELATING TO ISSUE OF EMPLOYER'S SPONSORSHIP AND DOMINATION OF, AND AID TO INDEPENDENT.

On the night of October 2, 1941, a group of employees met at the home of Lundy Groves for the purpose of organizing an employees' association. The Board found that on the appointed night Clark Gibson, a foreman at employer's plant, met a group of employees on the street and adjourned a meeting which was to be held at his home to that of Lundy Groves, explaining that he could not have it at his house "There is too many C. I. O. members". This finding of the Board is based upon the testimony of Mrs. Mable Hinkle, who though not present at the meeting testified that Mrs. Lundy Groves, on the morning of October 3, in a conversation with her, had related that the meeting was to be held at Clark Gibson's home. In another portion of Mrs. Hinkle's testimony she quotes Mrs. Groves' statement that "Gibson's house was filled up." (R. 93). Mrs. Hinkle likewise quoted Mrs. Groves as saying that she called Irene Weese who in turn recommended B. E. Thompson, a local newspaper editor, who had had previous experience with labor unions. Board's witness, Mrs. Pearl Stewart, testified that she and some other girls saw Clark Gibson talking to Independent members on the street, and that the girls turned and went to the home of Mrs. Groves. Upon questioning by the Trial Examiner, "Could you overhear anything that was said between them and this Gibson?"; Mrs. Stewart responded, "No I did not." (R. 136).

B. E. Thompson admits that he went to the home of Mrs. Lundy Groves, but denies that he had had any communication from Irene Weese with reference to the meeting of the

employees at the Groves' home, or that she made any suggestion to him that he attend the meeting. He stated (R. 116) he attended the meeting in response to a call from Mrs. Lundy Groves. According to the record, Thompson, prior to his affiliation with the Independent as business agent, was editor of a newspaper in Richwood, and as such had written and published a series of editorials denouncing the activities of the Union, which he described as "radical." Thompson, as the record shows, had had previous experience with labor unions. He had helped organize an international union at Richards City, Tennessee, which resulted in collective bargaining and material improvement of the condition of the employees. He had likewise been a member of the Brotherhood of Electrical Workers, and was associated with another independent union in Richwood. (R. 104). Thompson disassociated himself from Independent on May 15, 1942, after a representative of the Board advised Thompson's employer that the Board was going to prefer unfair labor practices and company union domination charges against Thompson's employer, and suggested to that employer that he not only have Thompson disassociate himself from Independent but from Richwood as well, and that as a condition to withholding the complaint against the employer, Thompson had to be either discharged or transferred to some other location (R. 105-109).

At the organizational meeting Carm Reese was selected as President, E. G. Robinson, Vice President, Madge Dotson, Secretary-Treasurer, and Carm Reese, Lundy Groves, George Tyree, Zeka Smith and another were selected as the Board of Directors. The Board found that Carm Reese, Lundy Groves and Ancil Smith "were identified with management and that their conduct in connection with the formation and administration of the Independent is attributable to the" employer.

(R. 11, No. 17). A discussion of their duties as employees appears in that part of the Argument herein which challenges the findings of the Board that employer sponsored, dominated and interfered with the formation and administration of Independent and contributed support to it, and the Circuit Court of Appeals' approval of such finding.

ASSIGNMENT OF ERRORS.

The following assignment is limited in scope to those which directly affect Independent:

(1) The Circuit Court of Appeals erred in invalidating the contract of March 7, 1942, and in holding that Independent was not entitled to invoke the closed shop proviso of Section 8(3) of the Act and in holding that discharge of the employees, pursuant to said contract, was an unfair labor practice.

(2) The Circuit Court of Appeals erred in its holding that the Board was justified in finding that execution of the contract of March 7, 1942, with Independent was an unfair labor practice and, either upon or without such finding, was justified in considering in connection therewith alleged unfair labor practices which had antedated the election agreement and election.

(3) The Circuit Court of Appeals erred in its conclusion that the evidence sustains the Board's findings of company sponsorship and domination of, and aid to, Independent.

(4) Said Court erred in its decree that the Board's order be enforced.

ARGUMENT

I.

THERE IS NO FACTUAL OR LEGAL BASIS FOR THE COURT'S CONCLUSION THAT THE DISCHARGE OF EMPLOYEES WAS DISCRIMINATORY AND CONSTITUTED AN UNFAIR LABOR PRACTICE WITHIN THE MEANING OF THE ACT:

(a) The alleged discharges were made pursuant to a union shop contract, permissive under the proviso of Section 8(3) of the Act.

(b) The union shop provision, embodied in the contract, was agreed upon by the two competing unions and the employer and was approved by the Board.

(c) Knowledge of Independent's intention to exclude employees from its membership came after the agreement of the parties and approval of the Board.

(d) Independent had a legal right to exclude the employees from membership; such exclusion is not in violation of the Act.

At the outset, it is important to observe that there is no contention on the part of the Board that there was any conspiracy between the employer and the independent union to bring about the discharge of any of the employees denied membership in Independent. The Circuit Court of Appeals [141 F. (2d) 87, 91] itself says: "It would not be fair to the company to say that it conspired with the independent union to bring about a discharge of troublesome members of the opposite union." It is clear that the basis of the Court's

conclusion that the discharges constituted an unfair labor practice is because the company entered into the agreement of March 7, 1942, knowing that Independent intended to deny membership to some of the employees because of prior union activity. The statement by the Court that discharge of the employees was because of prior union activity is, of course, a conclusion only. The record shows that the thirty-one employees who applied for membership did not receive the required number of votes required by Independent's By-Laws and that discharge followed their failure to acquire the status of membership. Both the Circuit Court of Appeals and the Board (R. 21), predicated their conclusions on the factor of knowledge of what Independent intended to do; but it is asserted that each of these tribunals failed to give legal significance to the fact that this knowledge did not come to the employer until after it had entered into a binding pact for a union-shop provision. It must be remembered that the tripartite agreement wherein the employer consented to recognize a union shop in the event that either union represented a majority of its employees, was entered into on January 13 and it was not until February 28 that Thompson wrote the letter to employer demanding the closed shop. Not to be overlooked, also, is the fact *that the provision for union shop was without condition or limitation*, yet the Circuit Court of Appeals (supra, p. 91), opines that the employer "should have seen that provisions were inserted in the contract that would have protected their [minority] rights." Now, the Circuit Court of Appeals in another portion of its opinion (supra, p. 90), recites that there can be no judicial control of union membership, yet it places upon the employer the burden of inserting into the contract a condition, the effect of which is the control of such membership. In other words, what power the judicial process lacks, the employer, according to the

Circuit Court of Appeals, must insist upon—and insist upon, despite the fact that such a provision is in contravention of what the contracting parties theretofore determined to be their agreement. Would this not be an interference by an employer with the administration of a labor organization, which is prohibited by Section 8(2)? It is anomalous that a judicial tribunal would require that a contract be broken rather than to insist upon the parties thereto adhering to its terms when such terms are valid; yet such is the practical effect reached under the opinion of the Circuit Court of Appeals. Certainly no one would contend that the Union, as a party to the tripartite agreement of January 13, did not have a full understanding of the term "union shop" and the incidents thereof.

The pertinent portion of Section 8(3) of the Act reads as follows:

> "It shall be an unfair labor practice for an employer * * *
>
> "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act * * * shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made". 49 Stat. 452, USCA, Tit. 29, Sec. 158.

From statements of Senator Wagner, both upon introduction of the Act and thereafter, it is clear that his bill "merely preserves the status quo" except as the limitations expressly appear therein.* "Inclusio unius est exclusio alterius." When it is remembered that the Board had certified Independent after permitting withdrawal of the first charges and then allowing its name to be placed upon the election ballot, it may not be gainsaid that, under the Board's own recognition and conduct, Independent fulfilled the legal characteristics of a union with which a closed-shop agreement could be made under said proviso.

Prior to passage of the Act, the right of labor unions to determine the constituency of their membership had judicial approval. *Simpson* v. *Grand Inter. Bro. of Locomotive Engrs.* 83 W. Va. 355, 98 S. E. 580; *Mayer* v. *Journeymen Stonecutters' Assn.*, 47 N. J. Equity 519, 20 A. 492; *Murphy* v. *Higgins*, 12 N. Y. Supplement (2d) 913; *Miller* v. *Reuhl*, 2 N. Y. Supplement (2d) 394 (1938); *Greenwood* v. *Building Trades Council*, 1 Calif. Appeal) 159, 233 Pac. 823; 1 Teller, Labor Disputes and Collective Bargaining, 287 et seq., wherein the following appears:

> "There appears to be no legal theory in the absence of contractual provision to the contrary, whereby an employer can question the expulsion of a competent employee in consequence of which the employer is

* "Equally erroneous is the belief that the bill creates a closed shop for all industry. * * * Far from suggesting a change, *it merely preserves the status quo.*" (Italics supplied). Congressional Record, Vol. 79, pt. 3, p. 2372, 74th Cong., 1st Session. "The virulent propaganda to the effect that this bill encourages the closed shop is outrageous, in view of the fact that *in two respects it actually narrows the now existing law.* * * * In the first place, while today an employer may sign a closed-shop contract even with a minority group, the bill provides that he shall be allowed to negotiate such an agreement only with an organization which represents the majority. * * * Secondly, the bill is extremely careful to forestall the misuse of closed shop agreements with unions that are dominated by, or dominate, the company." Idem, p. 7570.

> obliged under the agreement to discharge him. This may in a given instance cause great harm to a business or production of an employer especially in a case where the expelled employee is a skilled workman whose skill is the result of long training in the employer's plant."

See also *Shein* v. *Rose*, 12 N. Y. S. (2) 87 (1939), wherein it is said that "Membership is a privilege and not a right."

In *Miller* v. *Reuhl*, 2 N. Y. S. (2d) 394 (1938), a rejected applicant for membership in a union sought by a court proceeding to compel the union to accept him for membership. The court denied the request, and because of its sound reasoning and expression of policy, we quote therefrom as follows:

> "Before these recent efforts to unionize industry had governmental sanction in the manner in which such sanction is expressed today, there had been efforts made on the part of individuals to force themselves into membership of unions and the courts have held in such cases that a union could not be compelled to accept an application for membership unless the union so desired. *The basis of such holding has been that, if the union which was a voluntary association organized for the good of those taken into membership and for those in industry who would be eligible to membership could be compelled to accept members, the persons whose interests were inimical to the union and its purposes could force themselves into membership in the union and, from within, destroy the union and thus stultify the purposes for which the union was organized.* * * *" (Italics supplied).

In some states where labor relations statutes have been enacted, the hitherto unqualified and unlimited autonomy of a

labor union has been encroached upon,[5] and by such statutory enactments provision is made against discriminatory rules of admission to membership in unions. The passage of such legislation indicates the necessity of legislative control—not judicial—if such autonomy is to be limited. This was expressly stated in *Miller* v. *Reuhl*, supra, wherein the New York court aptly stated:

> "As the Legislature had not enacted a specific statute compelling unions to accept members, this court is of the opinion that a labor union which is a voluntary association still has the right to reject applicants for membership at will. In view of this holding, one might ask what is to become of the applicant if he is true in his statement of fact that he will be unable to obtain employment at his chosen vocation because he is not a member of the union. This is a question involving public policy and must be answered by the Legislature. *In enacting legislation to strengthen the cause of labor through unions, the Legislature has not made provision to compel unions to accept members. Its failure to do so must be accepted as the present expression of public policy and therefore an indorsement of the view expressed in the cases above cited that an applicant for membership cannot force his way into the union against the negative vote of the union.*" (Italics supplied)

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[5](a) Pa. Stat. Ann. (Purdon, tit. 43, § 211.6 (1) (c): "* * * if such labor organization does not deny membership in its organization to a person or persons who are employers of the employer at the time of the making of such agreement * * *"

(b) Laws of Wisconsin (1939) Ch. 57: "The Board shall declare any such collective agreement terminated whenever it finds that the labor organization involved has unreasonably refused to receive as a member any employee of such employer * * *."

(c) Laws of Kansas, (1941), Ch. 265: "No labor organization * * * shall be the representative unit for the purpose of collective bargaining * * * which in any manner discriminates against, or bars, or excludes from its membership any person because of his race or color * * *."

In *N. L. R. B. v. Electric Vacuum Co., Inc.*, 315 U. S. 685, 62 S. Ct. 816 (1942) it was said that the proviso expresses "The precise nature and limits of permissible employer activity in union organization." The duty imposed by the Circuit Court of Appeals in the instant case certainly goes beyond that permissible employer activity.

The Circuit Court of Appeals defines a union-shop contract to mean "that the employees of the company would be required to become members of the successful union as a condition of retaining their employment, not that the successful union might have discharged from employment those who had been on the opposite side of the dispute even though they were willing to become members, by the simple device of denying them membership." It is submitted that the negative portion of that definition is contrary to the principle which permits a union to determine the constituency of its membership. Of course, membership is a *must* if a workman is to retain his employment[2]; but if an employer, as prerequisite to its agreeing to a closed or union shop agreement may require the union holding the agreement to waive its right of member selection, it may well be questioned whether, in time, the employer would not be in control of the union itself. In the instant case, there is nothing in the record which justifies any definition of the "union shop" than that which is generally accorded it. There is nothing upon which even an inference may be established that either union signatory to the settlement agreement intended that there should be a waiver of its right to determine who should be admitted to membership. How could there have been any aid to Independent by reason of the employer's signing the contract of March 7,

[2] "Under the 'union shop' non-members may be employed, but to retain employment must become union members after a certain period." How Collective Bargaining Works (Twentieth Century Fund) p. 21, Note 11.

1942: *The obligation of the employer to provide a union shop was already fixed* and the right of Independent to exclude existed. Clearly distinguishable is the case at bar from the *Electric Vacuum Co.* case, supra. The issue of which was an employers right to assist a union representing an uncoerced majority to secure new members, prior to a closed shop agreement. In the case at bar, the reasoning of the Circuit Court of Appeals, it is respectfully submitted, reaches a point of confusion when it employs as a basis for holding the employer guilty of an unfair labor practice, that the Act was never intended to authorize a majority to discriminate against a minority, for the Act deals with employer discrimination—not with union discrimination.

If, as shown above, the adoption of the Act into law permitted an employer to enter into a union shop agreement within the limitations expressly stated in the proviso of Section 8(3), all of the incidents of the union shop necessarily attended. Membership selection is one of its incidents. Therefore, in construing the rights of an individual or of a minority group under the Act, it is clear that whatever those rights may be, they are subject to the incidents of the union shop itself.

The matter of public policy, which the New York court in *Miller* v. *Rendl*, supra, considered so pertinent, the omission of limitation upon membership selection in the proviso in Section 8(3) and the inclusion thereof in state statutes as well as the effect of the tripartite agreement itself, are phases which the Circuit Court of Appeals did not discuss, and which we submit are vital in a determination of this issue.

The Board cited as authority for the result reached by it in the instant proceeding the cases of *Matter of M. Henri*

Wines, Ltd., 44 N. L. R. B. 1310 and *Matter of Rutland Court Owners, Inc.*, 44 N. L. R. B. 587, and the Circuit Court of Appeals approved thereof. It is submitted that these cases are not parallel to that of the one under consideration and therefore not controlling. In each of the cited cases there was lacking the obligation of the employer to enter into a contract calling for a provision under which applicants could be rejected. There was lacking also an agreement to which the complaining union had lent its signature and the Board its approval. Moreover, the facts in the two cases are so dissimilar to the one involved here as to make them inapplicable. The gist of the issue before the Board in the *Rutland Court Owners* case was the right of employees to change representatives and did not involve the right of a union to reject an applicant for membership. In the *M. Henri Wines, Ltd.* case the union first used the employees' designation of it as a bargaining agent to obtain a closed-shop agreement and then denied the employees membership in the union. The Board condemned the union's actions as a fraud upon the employees.

It is difficult to perceive how the rights of Independent may be affected under a charge that the employer discriminated in discharging the employees in a record which does not show any discriminatory purpose or any evidence that the employer knew that those whom it laid off had been Union members.

II

THE CIRCUIT COURT ERRED IN HOLDING THAT THE BOARD WAS JUSTIFIED IN CONSIDERING ALLEGED UNFAIR LABOR PRACTICES WHICH ANTEDATED THE ELECTION AGREEMENT AND THE ELECTION.

It is not clear from the opinion of the Circuit Court of Ap-

peals what its basis is for permitting the Board to inquire fully into the history of Independent to determine whether it was a proper agency within the meaning of the Act. In one portion it declares that "even if charges such as those were involved but not considered of themselves unfair labor practices within the meaning of the act, we think that the Board was justified under the circumstances * * * in going fully into the question of company domination and holding the Independent to be a company dominated union and hence not entitled to invoke the closed shop provision," while in another portion of the opinion the Board's power so to do is limited "in the light of subsequent developments." The latter quoted portion is as far as the Board itself has gone. In a number of cases which involve consent election agreements and approval by Board's representatives, the Board has evidenced its desire to uphold such agreements and its decisions have reflected a pattern of policy. In *Simplicity Pattern Company, Inc.*, a corporation, and *Local No. 92 International Union U. A. W. of A.*, 16 N. L. R. B. 291, a somewhat analagous situation to that involved in the instant case was considered. Therein, as here, charges had been made to the effect that the employer had discriminated against the C. I. O., and had dominated and interfered with the formation and administration of an Independent, had contributed support to it. As here, a settlement agreement had been entered into, and it was claimed that the employer had not complied with the terms of such settlement agreement. The Board, however, held as follows:

> "We are of the opinion that the respondent has substantially complied with its agreement of April 27 with the U. A. W. A. It is apparent from the record that both parties were in doubt as to the probable outcome of the charges, or some of them, if they should proceed to a hearing. The proposed settle-

ment, suggested by the Regional Director, was not patently unfair or unjust, and a compromise of such matters on terms such as those agreed upon should not be discouraged. As we have heretofore stated in other cases, the Board is not precluded by a settlement or compromise of unfair labor practice charges from proceeding with a determination of such charges, even though the Regional Director or other agent of the Board, as here, may have participated in and sanctioned the compromise agreement. Nevertheless, *effective administration of the Act requires that the Board recognize and respect matters of adjustment in which its agents have participated.* We believe that in the case before us the policies of the Act will best be effectuated by giving effect to the compromise agreement made between the respondent and the U. A. W. A. and by refraining from a consideration of matters set forth in the charges filed by the U. A. W. A. on April 26. We shall therefore dismiss the complaint in so far as it relates to matters covered by those charges."

Board Member Leiserson would have gone even farther, and would have held, in view of the consent election agreement, the election and the notice of neutrality which employer posted at the request of the Board's agents, that the complaint be dismissed in its entirety. See also *Chambers Corporation and Allied Stove Mounters and Stove Processors, Union Local* 5 LRR Man 132; *Matter of Wickwire Bros.*, 16 N. L. R. B. 316; *Matter of Hope Webbing Company*, 14 N. L. R. B. 55.

The statement of the Court, that even if the discharges were not of themselves unfair labor practices within the meaning of the Act, goes far beyond the policy or contention of the

Board itself; and, in fact, is in contravention of a decision of the Circuit Court of Appeals.

In *Hazel-Atlas Glass Company* v. *NLRB*, 127 F. (2d) 109 (1942) CCA 4, the Court gave full faith to a settlement agreement and held that violations of the Act which were the subject of the settlement agreement, had little significance because of the agreement which had Board approval. No reference was made by the Circuit Court of Appeals in the opinion in the case under appraisal of the *Hazel-Atlas Glass Co.* case. In *NLRB* v. *Appalachian Electric Power Company*, 140 F. (2d) 217 (1944), recognition of Board certification was required of an employer to avoid "litigious bedlam and judicial chaos." We submit that the Board should be held to its own certification for the same reasons.

In the instant case parties to the settlement agreements in executing them, and the Board in approving them, unquestionably regarded their execution as the settlement of the controversial issues over which there had been disagreement for some time. One of such issues was the charge, made by Union, that the employer had sponsored the Independent. In such charge a Board agent lent encouragement. The effect of the Circuit Court's approval of the Board's review of the issues thus settled is to say that one party to an agreement is bound by the contract only if it is successful in obtaining a majority vote. Unless significance is attached to the execution of the settlement agreements, a signed contract between an employer and competing labor unions, is rendered meaningless and would justify contracting parties to assume an attitude of irresponsibility toward their solemn written words. The Circuit Court stresses the point that the Board is required to perform its duty. That requirement is, of course, appealing, but since the Board was fully informed, it should not now

be permitted to assume a position inconsistent with its approval and conduct, particularly where others have acted in reliance thereof. Agreements between an employer and opposing unions have become an integral part of the Board's procedure for determining bargaining representatives.[7] Litigants before the Board should not be placed in a position where they cannot feel with security that there is finality to their agreements. When it is recalled that certification by the Board followed an expression of choice on the part of the employees involved, the language in *NLRB* v. *Sun Shipping and Drydock Company*, 135 F. (2d) 15, CCA 3, is peculiarly appropos in the instant proceeding:

> "* * * After all, the fundamental purpose of the Act is to secure to employees entitled to its protection the right to bargain collectively through representatives of their own choosing. Obviously, therefore, once a majority choice has been competently polled and authoritatively certified, it is not to be avoided lightly. Otherwise the employees' right may actually be infringed and the purpose of the Act thereby thwarted."

III

THE CIRCUIT COURT OF APPEALS ERRED IN SUSTAINING THE BOARD'S FINDINGS THAT THE EMPLOYER DOMINATED AND INTERFERED WITH THE FORMATION AND ADMINISTRATION OF INDEPENDENT AND HAS CONTRIBUTED SUPPORT TO IT.

The Circuit Court of Appeals, without detail of the evidence relating to the Board's contention that the employer had sponsored, dominated and interfered with the formation and administration of Independent, summarily approves the

[7] Eighth Annual Report NLRB, 52.

Board's findings. The position of Independent, as in the court below, is that the Board's findings are not based upon substantial evidence but are contrary, not only to the evidence, but to well-established legal principles.

An analysis of the Board's decision discloses that, in order to conclude that the employer had dominated and interfered with the formation and administration of Independent, the Board employed four findings which we shall discuss *seriatim* and each of which it is contended is erroneous:

> (1) *That Clark Gibson, a foreman at employer's plant associated himself with a group of employees who participated in formation of Independent.*

It is submitted that there is no competent legal testimony to support such a conclusion. The testimony of Board's witness, Mrs. Pearl Stewart, typifies the basis employed by the Board to reach its conclusion and to assert its factual finding. She testifies that she and some other girls saw Gibson talking to Independent members on the street and that the girls turned and went to the home of Mrs. Groves where, admittedly, the first meeting was held; but when the Trial Examiner propounded to her the next question, "Could you overhear anything that was said between them and this Gibson? she responded, "No, I did not." Yet the Board states in its Decision (R. 136) that "* * * that night Gibson met the employees on a street corner and adjourned the meeting to the home of Mrs. Lundy Groves, who lived in a more secluded section of Richwood, because Clark Gibson's house was 'filled up' and 'there [were] too many C. I. O. members [about].'" It is to be noted that the Board fills in what it desires that the witness should say by adding the words in the quoted portion in brackets. The latter part of the quoted por-

tion is based upon the testimony of another Board witness, Mrs. Mabel Hinkle, who testified that Mrs. Groves, after the Independent meeting had been held, said that such meeting was to be held at Clark Gibson's but that his house was filled and the meeting had to be held at Mrs. Groves'. Mrs. Hinkle herself had not been at the meeting, had not heard Clark Gibson make any statement concerning the meeting, and simply attempted to mouthpiece Mrs. Groves purported statement to her. This evidence is purely hearsay and may not be used as a basis for showing that Gibson associated himself with a group of employees who participated in formation of Independent.

The test of sufficiency of testimony necessary to uphold a finding of the Board is worded thus in *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 83 L. ed. 126, 140:

> "We agree that the statute, in providing that the findings of the Board as to the facts, if supported by evidence, shall be conclusive, means supported by substantial evidence. * * * Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

The testimony of Mrs. Stewart and Mrs. Hinkle does not meet that test, and there being no testimony on the issue which does, the conclusion of the Board of Gibson's participation in the formation of Independent does not have legal basis.

(2) *That B. E. Thompson, who became Independent's business agent, attended Independent's first meeting as a result of the recommendation of Weese, whom the Board identifies with management.*

As the record shows, Thompson, editor of the Nicholas

Republican and a person of considerable experience in labor organizations, attended the first meeting of the Independent, at Mrs. Groves' home. Weese, secretary to Plant Manager Davis, admits a telephone call from Mrs. Groves the night of the meeting about some assistance in organization of the employees' group. She testified (R. 232) that she did not recall mentioning Thompson's name but referred Mrs. Groves to The Greater Richwood Federation, an organization of businessmen. Thompson testified that he had had no communication from Weese with reference to any meeting and he stated positively upon inquiry from the Trial Examiner that Weese made no suggestion to him that he attend it. Yet the Board finds that "Weese recommended Thompson to Mrs. Lundy Groves and that she invited Thompson to attend the meeting as a result of Weese's recommendation." (R. 11)

That there is no legal significance which may attach to the fact that Mrs. Groves called Weese for advice is clear from the testimony that it was not an unusual occurrence for the employees to consult her about their personal affairs every day, one witness stating that they consulted her about "everything from new babies, hospitalization, operations," selective service and other matters. (R. 217, 218). Moreover, as the record shows, Thompson was business agent for another independent employees' labor organization in the town of Richwood (R. 104), and it is a reasonable presumption that that fact was the basis for Mrs. Groves' call to Thompson and his resultant attendance at the meeting.

Further, it is submitted that the Board was in error in identifying Weese with management. She has no authority to give orders other than as directed by Manager Davis. (R. 217). In *Cupples Co. Mfgrs. v. Board*, 106 F. (2d) 100 (CCA 8), in speaking of a "forelady" or "supervisor" who had

openly urged employees to join an independent union and advised them that if they did not join, they might lose their jobs, and whose duties consisted of transmitting orders from her superiors to employees under her, and who had authority to recommend employment or discharge, but had no power to hire or fire, the Court stated:

> "It seems to us that the question of her title is unimportant, and that the vital question is whether, under the evidence, she was or could reasonably be found to be the representative of the Company in connection with her activities relating to the two labor unions."

In *N. L. R. B.* v. *Poultrymen's Service Corporation*, 138 F. (2) 204 (CCA 3), the Board had included within the appropriate unit three employees who had access to confidential company information but not with respect to labor relations. The Court stated that, "Possession of confidential information is of itself insufficient to justify deprivation of the right to collective bargaining."

(3) *That "The Independent lent itself to the respondent as an aid in the back-to-work movement in opposition to the Union."*

The Union called a strike on September 25. The employees' organization came into existence in October. For approximately four months the employees were out of employment. It is true that there is testimony of the Company's supervisory force attempting to get its employees back to work, and that Griffie, a Union member, quoted Groves, an Independent member, who solicited Griffie's membership in Independent, as saying "that was the only way we was ever a-going to get back to work up there, if we ever got this thing settled we would have to settle it in that way." Of course,

Groves was interested in two things: (1) getting back to work himself and (2) getting additional members for his labor organization. Certainly condemnation of those motives is not warranted. The Board's opinion records, also that Wallace decided to resume plant operations after talking with Richwood inhabitants and Independent adherents who desired to return to work. The right to return to work is the subject of comment in *Polish Nat. Alliance Etc.* v. *N. L. R. Bd.* 136 F. (2d) 175, 181 (CCA 7). It reads:

> "In our view, this order as to Ziolkowski is clearly erroneous. Certainly, he as an individual, the same as any other employee, had a right to strike or not to strike as he saw fit. After having joined the strikers, he had an equal right to continue on strike with the others or to return to work as he saw fit. He chose the latter course, and as the Board found, his right to work was discriminatorily denied by petitioner. One member of the Board dissented from the order as to Ziolkowski, stating that he was entitled to be made whole from October 10, 1941, the date when his application to return to work was discriminatorily denied. The soundness of the dissent, in our judgment, is unquestionable, and we take the liberty of quoting therefrom the following statement: *'The policy of the Act would, in my opinion, be best served by encouraging those who have gone out on strike because of their employer's unfair labor practices to return to work and to avail themselves of the administrative remedy which the Act affords them and we should do nothing to deter any individual striker from such action.* The effect of the majority's decision would, it seems to me, be to prolong unfair labor practice strikes and to discourage employees from recourse to the adequate relief available to them under the Act." (Italics supplied)

(4) *That the activities of Carm Reese, Lindy Groves*

and Ancil Smith, all employees, in connection with the formation and administration of Independent, are attributable to employer.

At the outset it is important to note that Carm Reese, Lundy Groves and Ancil Smith, whose activities in connection with the formation of Independent are attributable to employer, were on the list of eligible voters agreed upon in the consent election agreement and while the ballots of the first two were challenged by the Union but eventually the challenges were waived. (R. 190). The facts relating to the employment of these three individuals are as follows:

CARM REESE

According to testimony of Davis, employer's manager, Carm Reese, at the time of the strike was an oiler in the mill room. (R. 205). He was without authority to hire and fire and could not discipline other employees. (R. 206). At the time of the hearing he was a filer. "His job is the circular saws principally; he straightens them; cleans them, puts new cutting teeth in them by grinding them or filing them, automatic filers, automatic grinders, he puts the saw in and takes it out, inspects it." At the time of the strike the sawyer and saw filer, employees also in the mill room, received higher rates of pay than Reese who was paid on an hourly basis. Following the strike, an experienced man was needed in the filing room and, no one other than Reese being available, he was given the job which carried a slight increase in pay over his job as oiler. (R. 207).

LUNDY GROVES

It was the job of Lundy Groves to keep the machines in the clothespin department in operation. His job was termed

a "set up man" and consisted of "grinding and adjusting cutting knives." He was paid on an hourly basis. If a machine became faulty, the girl operating it had the authority to tell Groves to repair it, and he, in turn, could direct her to another machine because "it is to their advantage to keep working." Clark Gibson is the foreman in this department in which there are five set-up men, none of whom have any more authority than another. After the strike Groves held the same position that he had at the time of the strike, and received no pay increase other than general increases. (R. 208-210).

ANCIL SMITH

In the wood dish department, Reed Shaffer and Ancil Smith are the set-up men. They are both paid the same rate on a hourly basis, and neither has any authority. (R. 211-212).

The testimony shows that Reese, Groves and Smith punch time clocks (R. 215). A Union leader, Mike Goheen, was a set-up man in the paper dish department. Except for the foreman, Goheen received the highest hourly rate of pay in his department. His position was the same as that of Groves and Smith, except in a different department. By reason of seniority, Groves "might be regarded as temporary foreman in the absence of the regular foreman." The same basis—seniority—results in others being considered as temporary foremen. Davis testified that Smith had never been used as such. In footnote 17 of the Board's opinion (R. 12) this amazing statement appears:

> "A union leader, Mike Goheen, was also employed as a machine set-up man, but, so far as appears, he did not act as a temporary foreman. *Other employees*

who belonged to the Union acted as temporary foremen but, so far as appears, they were only rank and file union members. (Italics ours.)

Remarkable indeed is the Board's conclusion that Reese, Smith and Groves were identified with management whole no such conclusion is reached as to Union members—temporary foremen—because "they were only rank and file union members."

Citation of *International Assn. of Machinists* v. *N. L. R. B.*, 311 U. S. 72, as authority for the Board's conclusion as to these three men, is unavailing. The test set forth in that case is that the employees "were emulating the example set by management." Such is not the instant case. In *Magnolia Petroleum Co.* v. *N. L. R. B.*, 112 F. (2d) 545 (CCA 5), a sub-foreman had been elected temporary president of the independent union, and his activity was relied upon as one evidential fact to prove company domination and interference. The Court stated::

> "Thus, by its finding, the Board denies to Barton the very right the statute gives him, of action with his fellow-employees for self-organization."

In *N. L. R. B.* v. *Swank Products*, 108 F. (2d) 872 (CCA 3), it was said:

> "Nor do we think that the acts of Stephenson and the other job supervisors in forming and trying to control the policy of the new Association, were tied to the management. They were acting, so far as the evidence shows, spontaneously and for themselves. Because men express dislike to organized labor does not, as the Board suggests in its argument, indicate that they must be acting for the management."

Certainly the record does not justify any conclusion that the three employees discussed under this heading were emulating any example set by management or acting for management, or acting except for themselves and their fellow-employees in pursuance to the right of self-organization accorded them under the Act.

In a proceeding before the Board involving The Cherry River Boom & Lumber Company, 44 N. L. R. B. 273, to which the Board has made reference in its opinion in this case, the Board dealt with the question of whether one Powers was identified with management although just a laborer. Powers was paid by the hour, worked under the supervision of a foreman but sometimes worked with a crew of from one to five men who were assigned to assist Powers. He had no authority to discipline or to hire or discharge them. Several employees testified that he was "boss" and that he told the men what to do and how it should be done. Both Powers and the works manager testified that he was employed only as a laborer. The Board's opinion reads as follows in denying that Powers is identified with management:

> "Although it appears that Powers instructs the other workmen assigned to assist him in repairing the docks, such instruction is not necessarily indicative of his employment in a supervisory capacity. He was the only repairman permanently assigned to and charged with repairing the docks, and his direction of the other workmen is reasonably attributable to this fact and to his consequent familiarity with that particular work. As was true with reference to the conductors and yard graders, we do not believe that the fact that Powers keeps the time of the repair crew is of controlling significance. We are of the opinion that Powers' relationship with the other repairmen on the dock is similar to that of a machinist and his helpers. But we are convinced, therefore, contrary to the

> Trial Examiner, that Powers was neither employed in a supervisory capacity nor accorded ostensible supervisory authority by the respondent. Accordingly, we find that the respondent is not chargeable with the activities of Powers hereinabove set forth."

In the same opinion the Board also finds that yard graders are not a part of management although there was testimony that employees regarded them as "bosses." The Board's language is,

> *"Although several employees who worked as lumber handlers testified that they considered yard graders to be 'bosses' and representatives of the management, the evidence, in our opinion, does not support the finding of the Trial Examiner that they are generally so regarded by the respondent's employees."* (Italics ours)

If, in the instant case, the same rule or test were applied to Reese, Smith and Groves, the error of the Board in identifying them with management is readily apparent.

We submit that the facts relied upon by the Board to stamp Independent as a company-dominated organization do not meet the legal requirements and therefore the findings of the Board in relation thereto do not raise any presumption that such conclusions are warranted. As indicated above, the Circuit Court of Appeals did not weigh the evidence or analyze it in its opinion. Moreover, the Court did not distinguish between the evidence which related to the employer's alleged attitude toward Union or alleged anti-union statements by its supervisory employees and that evidence which related strictly to the organization and administration of the Independent. This distinction, we submit, is important in a

proper appraisal of this case so far as the rights of Independent are concerned.

CONCLUSION

For the reasons indicated, the decision and decree of the Circuit Court, as well as the decision and order of the Board, should be reversed and set aside in so far as they in any way affect the right of, or restrict or prevent Independent from acting pursuant to its certification, or require its disestablishment or require the employer to cease giving effect to the contract of March 7, 1942.

Respectfully submitted,

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October 14, 1944.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment

membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by a majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

66 67

Nos. 927 and 928

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE WALLACE CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

RICHWOOD CLOTHESPIN & DISH WORKERS' UNION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court below (R. 345–352) is reported in 141 F. (2d) 87. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1–33) are reported in 50 N. L. R. B. 138.

JURISDICTION

The decrees of the court below (R. 352, 413–414) were entered on February 3, 1944. Petitions for rehearing filed by The Wallace Corporation (herein called petitioner) and by Richwood Clothespin & Dish Workers' Union (herein called the Independent) were denied on March 13, 1944 (R. 353–357, 415–419). The petitions for writs of certiorari were filed on April 24, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

Petitioner, the Union, and the Independent entered into agreements, with the Board's approval, purporting to settle a labor dispute, including a strike, and charges filed with the Board by the Union alleging, *inter alia*, that petitioner had interfered with and dominated the Independent in violation of Section 8 (1) and (2) of the Act. Subsequently, as the result of a consent election, the Independent was certified as the bargaining representative of petitioner's employees. Thereafter petitioner, knowing that the Independent intended to refuse membership to certain employees because of their prior activities in behalf of the

[1] Local Union No. 129, United Construction Workers Organizing Committee, affiliated with the C. I. O.

Union, entered into a closed-shop contract with the Independent. Petitioner subsequently discharged employees who had been refused membership in the Independent because of their previous adherence to the Union. The questions presented by the petition are:

1. Whether the Board abused its administrative discretion in considering petitioner's entire course of conduct both before and after the settlement agreements.

2. Whether petitioner's action in entering into and giving effect to the terms of the closed-shop contract with the Independent, when it knew that the Independent intended to refuse membership to employees because they had previously engaged in activities in behalf of the Union, constitutes a violation of Section 8 (3) and (1) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 24–25.

STATEMENT

Upon the usual proceedings the Board issued its findings of fact, conclusions of law, and order (R. 1–33).[2] The pertinent facts, as found by the

[2] The Board issued its decision and order on June 7, 1943 (R. 31). Previously, the Board had vacated an earlier decision and order issued on February 27, 1943, and had heard reargument of the case on May 13, 1943 (R. 6).

Board and shown by the evidence, may be summarized as follows:

From the beginning of the Union's organizing campaign in July 1941, petitioner engaged in a counter-campaign of opposition. On the day the Union held its initial organizing meeting Foreman McIlwee told a group of employees that M. B. Wallace, Jr., petitioner's president, had declared that he would close the plant and move it away rather than recognize the C. I. O. union. He urged the employees to attend the scheduled meeting and to oppose organization of petitioner's employees into the Union (R. 8; 294, 304–305). On another occasion Foreman McIlwee warned employee Dodrill, a leading organizer for the Union and subsequently its president (R. 293, 302), that employees who joined the Union would lose their jobs if Dodrill did not "quit agitating union and getting signers" (R. 8; 294, 303–304). Soon after Dodrill began his organizing activities he was questioned by Foreman Gibson about his union activities, and was warned that President Wallace "would never recognize the C. I. O." (R. 9; 294, 302–303). Another foreman, Harry White, cautioned Dodrill that if he "did go ahead and organize * * * Wallace would not recognize the Union, that we would all be out of a job, he would shut the plant down and move it away

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[1] References preceding the semicolons are to the Board's findings; succeeding references are to the supporting evidence.

* * *" (R. 9; 294–295, 305–306). Foreman White on other occasions told employee Griffie, also a union leader, that "the C. I. O. would never operate in that plant" and that Mr. Wallace had so stated to Plant Manager Davis (R. 9–10; 258–259, 264). Similarly, shortly before the strike in September 1941, Foreman Sleeth addressed anti-union remarks to Dodrill's wife, also an employee, and predicted that "the ones that did not sign up with the C. I. O. didn't have anything to worry about * * * that the company would see that they was taken care of" (R. 9; 276–278).

Early in September 1941 the Union asked petitioner for recognition as the bargaining representative of its employees (R. 11; 259). Petitioner, although challenging the Union's majority claim, refused the latter's offer to have its membership application cards checked against petitioner's pay-roll unless petitioner's Plant Manager were given an opportunity to question each employee individually with respect to his designation of the Union (R. 11; 295–296, 298–299, 311–312). When the Union rejected this proposal, Plant Manager Davis suggested the holding of a Board election. The Union agreed, on condition that petitioner reinstate Dodrill, who had been discharged by petitioner in August (R. 11; 295–296, 299–300, 312–313). Plant Manager Davis rejected this proposal on the ground that Dodrill "was too much of a union agitator" (R. 11; 296).

On September 25 the Union called a strike and established a picket line at the plant, which was shut down the same day (R. 11; 259, 296, 312–313).

With the advent of the strike petitioner launched the Independent. A group of employees arranged to meet at the home of Foreman Gibson on the night of October 2 for the purpose of forming an organization (R. 11–12; 259–260, 266–267, 285–287). On the appointed night Gibson met the group on the street and adjourned the meeting to the home of his assistant, Lundy Groves, explaining that, "I can't have it at my house, there is too many C. I. O. members" (*id.*). Groves worked under Gibson and acted as foreman in Gibson's place when the latter was absent from the plant (R. 13; 260–263, 265–266, 270–271, 283–284, 316–317, 320–321). The Independent was organized at the meeting in the Groves' home. The organization was assisted by B. E. Thompson, a local newspaper editor, who was recommended to the group as an adviser by Irene Weese (R. 12; 190–192, 266–269, 273–275); petitioner's paymaster and confidential secretary to Plant Manager Davis (R. 12; 183–184, 318–319). Thompson became the Independent's business manager, but leadership among the employee participants in the organization was assumed by Groves, together with Reese and Smith, supervisory employees who held positions of responsibility with petitioner similar to

Groves (R. 13, 21; 176–177, 269–270, 277–278, 280–283, 288–292, 297–298, 306–308, 310–311, 317–318). All three men attended the initial organizing meeting of October 2, at Groves' home (R. 268), and all three became members of the Independent's bargaining committee which conducted negotiations with petitioner (R. 12–13; 67, 314). Both Groves and Reese were members of the Board of Directors of that organization (R. 21; 275), and Reese was its president at the time it first requested recognition by petitioner (R. 13; 313). Groves also solicited members for the Independent during the strike (R. 14; 260).

On October 10, 1941, the Union filed charges with the Board, alleging, *inter alia*, that petitioner had violated Section 8 (2) of the Act by sponsoring the formation of the Independent (R. 13; 116–117). On October 14, the Independent requested recognition by petitioner as bargaining representative of the employees (R. 13; 313). On October 31, the Independent filed with the Board a petition for investigation and certification of representatives of petitioner's employees (R. 13–14; 91).

During the ensuing two and one-half months, representatives of petitioner, the Board, and the two unions engaged in negotiations looking toward settlement of the entire controversy, including disposition of the Union's charge and the Independent's petition (R. 14–15; 82, 235–239, 296–297, 300–301, 314–315). Meanwhile the Independent's

membership drive proceeded, coupled with a company-sponsored back-to-work movement. Petitioner mailed post cards to employees and sent foremen to their homes soliciting their return to work (R. 14; 271; 279–280, 308–310, 315–316, 322). During this period petitioner's foremen solicited employees to join the Independent and warned them that the plant would "never run under the C. I. O." (R. 14; 260, 279, 308–309).

Between January 13 and 19, 1942, petitioner, the Independent, and the Union entered into agreements providing for termination of the strike, immediate resumption of operations at the plant, and an election to be conducted by the Board to determine whether either of the two unions represented a majority of petitioner's employees (R. 15–16; 63–72). The agreement provided further that if either union won the election, petitioner would enter into a "union shop" contract with it (R. 16; 66).[4] Finally, the election agreement provided for settlement and withdrawal of the Union's pending charges, in consideration of petitioner's promise not to dominate or interfere with the Independent or otherwise to interfere with its employees' rights under the

[4] The provision regarding a union shop reads as follows (R. 66):

"The Company further agrees that if either Union is proven to represent a majority of its employees by said vote, it will recognize a Union Shop, providing that the Company shall at all times retain the right to suspend, hire, or discharge any employee for proper and just cause."

Act (R. 16; 63–65). At the election, held on January 30, the Independent received a majority of the votes cast, and on February 4 it was certified by the Board's Regional Director as the exclusive collective bargaining representative of petitioner's employees (R. 19; 73–74).

Following the election petitioner and the Independent entered into bargaining negotiations. On February 28, the latter wrote to petitioner demanding a closed-shop contract as a necessary means of preserving its small majority against possible dissipation at the hands of those employees who preferred the Union (R. 19; 84–86). The letter stated that, since the election, petitioner had hired several new employees who "are favorable to the interests of our opponents" and that "if other similar-minded employees are given jobs in your plant, it won't be long until our majority of 15 will be either jeopardized or overcome." Declaring that the Independent intended to use the proposed closed-shop agreement, not merely to require all employees to become members but also to remove from the plant those employees who, prior to the election, had exercised their rights under the Act by participating in the Union's organizing campaign, the letter stated (R. 85; italics added):

> The "Closed Shop" will, therefore give us some control in preventing the hiring of additional employees who are unfavorable to our interests and who would fur-

> ther jeopardize our majority. It would also provide us with a legal means of disposing of any present employees, including Harvey Dudrill, whom our members have declared by unanimous ballot that they will not work with, whose presence in the plant is unfavorable to our interests because *those who are so unfavorable will not be permitted to become members of our organization* and without such membership they would not be permitted to work in the plant under a closed shop contract which we respectfully insist we MUST have.

On March 7, petitioner and the Independent executed a 2-year contract which provided that all present and future employees eligible for membership in the Independent "shall become members" within 10 days from the date of the contract or from date of hiring (R. 19; 75–81). On the same day a copy of the contract was posted in the plant (R. 19; 319–320). Thereafter, between March 7 and March 18, 31 of the petitioner's employees who applied for membership in the Independent were rejected because of their past adherence to the Union (R. 20, 22–23; 43, 263–264, 272–273, 297). On March 16, petitioner posted a notice that, pursuant to the contract, only members in good standing in the Independent would be permitted to continue in petitioner's employ on and after March 18 (R. 19–20; 90, 319), and on the latter date it excluded from its plant and dismissed the 31 employees who had been rejected by

the Independent, together with 12 other employees who had not applied for membership in the organization (R. 20; 121–122).

Upon these facts the Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1), (2), and (3) of the Act (R. 28–29). The Board considered the effect of the settlement agreements, the consent election, and the certification of the Independent, and concluded that in all the circumstances, including the making of the closed-shop contract, the purposes of the statute would be effectuated by considering petitioner's entire course of conduct, both before and after the settlement agreement (R. 22). Accordingly, the Board ordered petitioner to cease and desist from its violations of the Act, to cease and desist from giving effect to any contract between it and the Independent, to withdraw recognition from and disestablish the Independent as representative of any of its employees for collective bargaining purposes, to offer reinstatement with back pay to the 43 employees discriminated against, and to post appropriate notices (R. 29–31).

Thereafter petitioner and the Independent filed, in the court below, petitions to review and set aside the Board's order, and the Board filed its request that the order be enforced. On February 3, 1944, the court held that the Board's order should be enforced (R. 345–352, 413–414).

ARGUMENT

1. Petitioner challenges the Board's finding of a violation of Section 8 (2) on the ground that the Board acted improperly in considering events antedating the settlement agreements and the certification of the Independent pursuant to the consent election (Pet. 12–14, 18–21, 30–34).[1] We submit that this contention is without merit. It is "a fundamental conception of our law * * * [that] there can be no rule which would restrict the Board from an appropriate inquiry into a pending complaint * * * [and that] the extent to which the Board may refuse to go into matter raised by a complaint, either because the matter is stale or because it has been satisfactorily concluded theretofore, must rest in the Board's discretion." *National Labor Relations Board* v. *T. W. Phillips Gas & Oil Co.*, 141 F. (2d) 304, 305–306 (C. C. A. 3).

The court below held (R. 351):

> The Board's power to prevent unfair labor practices is not limited by agreements that may have been made. * * * Set-

[1] The Independent raises the same question (Ind. Pet. 4, 15–16) and in addition contends that certain of the Board's findings of fact are not supported by substantial evidence (Ind. Pet. 4, 16–18). The latter contention presents no question of general importance, and in any event the evidence summarized in the Statement (*supra*, pp. 4–11) fully supports the challenged findings, as the court below held (R. 346–348).

tlements approved by the Board should ordinarily be observed and administrative orders should not be lightly disregarded; (Cf. *Matter of Simplicity Pattern Co.*, 16 N. L. R. B. 291); but these are guides for the exercise of discretion by the Board, not limitations upon its power. It is the duty of the Board to prevent unfair labor practices; and the fact that it may have certified a union as a bargaining representative does not limit its power later to declare such union to be company dominated and order its disestablishment, if such course is seen to be proper in the light of subsequent developments.

This holding of the court below is in accord with the uniform decisions of the Circuit Courts of Appeals which have passed upon the question. *Sperry Gyroscope Co.* v. *National Labor Relations Board*, 129 F. (2d) 922, 926, 931 (C. C. A. 2); *National Labor Relations Board* v. *Hawk & Buck Co.*, 120 F. (2d) 903, 905 (C. C. A. 5); *National Labor Relations Board* v. *Thompson Products, Inc.*, 130 F. (2d) 363, 367–368 (C. C. A. 6); *National Labor Relations Board* v. *The Standard Oil Company*, decided March 20, 1944 (C. C. A. 6) enforcing with modifications 47 N. L. R. B. 517; *National Labor Relations Board* v. *Swift & Co.*, 127 F. (2d) 30, 31 (C. C. A. 6); *Canyon Corporation* v. *National Labor Relations Board*, 128 F. (2d) 953, 955–956 (C. C. A. 8), enforcing 33 N. L. R. B. 885, 890, 897–898, 903; *Utah Copper Co.* v.

National Labor Relations Board, 139 F. (2d) 788, 791 (C. C. A. 10), certiorari denied April 24, 1944, *sub nom. Independent Ass'n of Mill Workers* v. *National Labor Relations Board*, No. 802, this Term; *Magnolia Petroleum Company* v. *National Labor Relations Board*, 115 F. (2d) 1007, 1012–1013 (C. C. A. 10); *Warehousemen's Union* v. *National Labor Relations Board*, 121 F. (2d) 84, 92–94 (App. D. C.), certiorari denied, 314 U. S. 674; cf. *National Labor Relations Board* v. *Baltimore Transit Co.*, 140 F. (2d) 51, 54–55 (C. C. A. 4), certiorari denied April 3, 1944, No. 735, this Term; *National Labor Relations Board* v. *Sun Shipbuilding and Dry Dock Co.*, 135 F. (2d) 15, 23 (C. C. A. 3).

The Board found here, upon the evidence summarized above (*supra*, pp. 4–11), that prior to the settlement agreements, the consent election, and the certification of the Independent, petitioner had engaged in unfair labor practices in violation of Section 8 (1) and (2) of the Act by disparaging the Union and discouraging the employees from joining it (R. 8–10, 20–21), and by dominating, interfering with, and supporting the Independent (R. 11–14, 21). The Board found further that, subsequent to the settlement agreements and certification, petitioner engaged in unfair labor practices by executing and giving effect to the terms of the closed-shop contract with the Independent, when it knew that the Independent intended to use the contract to oust from their jobs employees who had supported the

Union during the election campaign (R. 19–20, 22–25). By this action, the Board found, petitioner discriminated against the Union adherents because of their membership in and activities on behalf of the Union, in violation of Section 8 (3) of the Act (R. 25), and further supported the Independent in violation of Section 8 (2) (*id.*). In these circumstances the Board followed its established practice of considering the employer's entire course of conduct in cases involving settlement agreements or consent elections where the employer has engaged in unfair practices both before and after executing such agreements (R. 22, 24–25).[*] As the court below held (R. 350–351), the Board clearly acted reasonably and did not in any sense abuse the administrative discretion it was required to exercise:

> * * * even if discharges such as those here involved be not considered of themselves unfair labor practices within the meaning of the Act, we think that the Board was justified under the circumstances, notwithstanding the agreement that had been made and the certification of the Independent, in going fully into the question of company domination and holding the Independent to be a company-dominated union and hence not en-

[*] *E. g.*, *Matter of Harry A. Halff*, 16 N. L. R. B. 667, 679–682; *Matter of Chicago Casket Company*, 21 N. L. R. B. 235, 252–256; Cf. *Matter of Wickwire Brothers*, 16 N. L. R. B. 316, 325; *Matter of Hope Webbing Company*, 14 N. L. R. B. 55, 74–75.

> titled to invoke the closed-shop provision. * * * [The] high-handed conduct of the Independent union here, is in violation of the clear spirit of the compromise agreement as well as of the rights of the minority, and the acquiescence of the company in that conduct, furnished ample justification for the Board to inquire fully into the history of the union * * * (R. 350–351).

The validity of the Board's order is thus sustained by its finding that the Independent existed in violation of Section 8 (2) of the Act. For in these circumstances any contract petitioner entered into with the Independent was invalid *ab initio*, and a closed-shop contract with it could not, under the proviso to Section 8 (3) of the Act, be made the basis for discharging employees on the ground that they had not become members of the Independent, regardless of the reason for their nonmembership. *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, 694. Consequently, the Board's conclusion that the discharges were discriminatory and in violation of Section 8 (3) of the Act was proper on this finding alone, irrespective of other considerations.

2. The validity of the Board's order does not depend merely upon its finding with respect to the second question. This question was considered by the Board only because, following its self-imposed rule of not going behind settlement

agreements unless there have been unfair labor practices subsequent thereto, it would have refused to consider the evidence that prior to the making of the settlement agreements petitioner had violated Section 8 (2) of the Act with respect to the contracting union (R. 20–21), unless it first found that petitioner, subsequent to the settlement agreements, entered into and acquiesced in the use of the contract for the purpose of effecting the discriminatory discharge of Union adherents in violation of Section 8 (3) of the Act (R. 24–25). Inasmuch as the court below decided the question as an alternative ground for supporting the Board's order, we discuss it below.

Petitioner contends that its action in making the closed-shop contract and carrying out its provisions, with the knowledge from the beginning that the Independent intended to refuse membership to employees for the reason that they had previously engaged in activities in behalf of the Union, is nevertheless protected by the proviso to Section 8 (3) of the Act (Pet. 19, 23–30).[7] The Independent advances a similar contention (Ind. Pet. 12–15).

[7] Petitioner contends also that the Board's finding that petitioner had knowledge of the Independent's intent is not supported by the record (Pet. 36–38). This contention is without merit. As the court below held (R. 347–348), the evidence set forth in the Statement (*supra*, pp. 9–10) constitutes ample support for the Board's finding (R. 19, 22).

We submit that this contention is without merit. The Board's conclusion, affirmed by the court below (R. 349–350), is supported by the history and purpose of the proviso to Section 8 (3) of the Act, which permits closed-shop contracts under certain limited conditions.

The Board stated in its decision that the proviso "is not a severable and separate portion of the Act [but] must be construed in the light of the statutory statements of policy and general provisions of the Act * * * the express purpose [of which] is to insure employees of their right of self-organization and a free choice of representatives" (R. 23). *National Labor Relations Board* v. *Jones & Laughlin Corp.*, 301 U. S. 1, 33–34; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 182–183.

The legislative history of the Act supports the Board's construction. The provision was not intended to grant employers *carte blanche* to join with majority unions in overriding the basic statutory rights of minority employees. On the contrary, Section 8 (3) was included in the Act for the purpose of limiting the conditions under which closed-shop agreements might be made.[8] The Report of the Senate Committee on Education and Labor characterized as "absolutely false" the

[8] The Board properly placed a narrow construction upon the limiting terms of the proviso. *United States* v. *Sharton*, 285 U. S. 518, 521–522; *United States* v. *McElvain*, 272 U. S. 633, 639; *United States* v. *Dickson*, 15 Pet. 141, 165.

notion that the "proviso attaches special legal sanctions to the closed shop or seeks to impose it upon all industry." It stated further that the "assertion that the bill favors the closed shop is particularly misleading in view of the fact that the proviso in two respects actually narrows the now existent law regarding closed shop agreements."[9]

In *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, this Court approved the Board's view that the majority-rule principle recognized by Section 9 (a) and the closed-shop proviso to Section 8 (3) of the Act do not constitute a license to the employer to join with the majority representatives of his employees in interfering with and coercing minority employees in the exercise of their broad rights under the Act. Noting the "illuminating comment" in the Senate Report quoted above, the Court stated (315 U. S. at 694–695):

> The provision for a closed shop, as permitted by Section 8 (3), follows grammatically a prohibition of discrimination in hiring. These words of the exception must have been carefully chosen to express the precise nature and limits of permissible employer activity in union organization.

In that case the Court rejected the company's contention that the Act permitted employer-assist-

[9] S. Rep. No. 573, 74th Cong., 1st Sess., pp. 12–13. To the same effect is the report in the House of Representatives, H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 19–20.

ance to a union once it had attained the status of majority representative.

It is clear, therefore, that the limitation which the proviso to Section 8 (3) imposes upon the individual employee's absolute freedom of choice of a bargaining representative is intrinsically related to, and carries no broader implication than, the limitation embodied in the recognition of the principle of majority rule in Section 9 (a). Under the latter section the employee is represented in matters of collective bargaining by the choice of the majority. Under the proviso to Section 8 (3), the employee, to preserve his employment, is further required to be a member of the union selected by the majority, as provided in Section 9 (a), if the employer enters into a valid closed-shop contract with that union. That is the limited extent of the "coercion" and "discrimination" implied by the closed-shop provision. The Board has properly held, therefore, in the instant case and in others,[*] that the right of an employer and a majority representative to enter into a closed-shop contract under the proviso to Section 8 (3) may not be diverted to thwart the basic purpose of the Act to insure to employees generally the right freely to select bargaining representatives.

The destructive effect of a construction contrary to that made by the Board may easily be

[*] *Matter of Rutland Court Owners, Inc.*, 44 N. L. R. B. 555, 46 N. L. R. B. 1040; *Matter of Monsieur Henri Wines, Ltd.*, 44 N. L. R. B. 1310.

demonstrated. If the employer and the majority representative were free to enter into a closed-shop contract designed to discriminate against the defeated minority group of employees, all of the employees could be deprived of their freedom to choose a representative. In all cases where it appeared likely, or even possible, that a closed-shop agreement might follow the selection of a majority representative, the employees, in order to protect their jobs, would be impelled to speculate as to which organization would ultimately win the support of the majority and thus avoid becoming marked as supporters of the minority group. The employees' right to choose a bargaining representative would consist merely of the right to guess which of two or more competing unions would ultimately be selected by the majority. It is inconceivable that so complete a negation of the whole purpose of the Act should be implied by a proviso, the sole purpose of which was to permit, under narrow restrictions, the voluntary execution of closed-shop agreements between an employer and the legal representatives of all his employees.

Petitioner's complaint that the Board's decision in effect directs the employer to "dictate admission to membership" in a union "if the majority becomes vindictive," and thus risk prosecution for violation of the Act in another respect, is not justified (Pet. 24–25). The Board's decision presents no such dilemma. The decision, as

the court below held (R. 349), contrary to the repeated assertions of petitioner (Pet. 19, 24–25, 27–28) and of the Independent (Ind. Pet. 12–15), in no sense touches the right of a union to select its membership free from outside interference. The Board held only that a closed-shop contract, while expressly permitted under the Act, may not be entered into by an employer with knowledge that it is intended to be used to discriminate against employees because of their legitimate union activities engaged in prior to the execution of the contract.[11]

3. The other contentions of petitioner warrant but brief consideration. Its protestations of good faith (Pet. 29, 36–37) are immaterial. *National Labor Relations Board* v. *Hudson Motor Car Company*, 128 F. (2d) 528, 532–533 (C. C. A. 6). See also *National Labor Relations Board* v. *Star Publishing Company*, 97 F. (2d) 465, 470 (C. C. A. 9); *Kansas City Power and Light Co.* v. *National Labor Relations Board*, 111 F. (2d) 340, 346–347 (C. C. A. 8); *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. (2d) 748, 752 (C. C. A. 7), certiorari denied, 313 U. S. 565. Cf. *Warehousemen's Union* v. *National Labor Relations Board*, 121 F. (2d) 84, 87 (App.

[11] *National Labor Relations Board* v. *Lion Shoe Co.*, 97 F. (2d) 448 (C. C. A. 1), setting aside 2 N. L. R. B. 819, 831 and *Hamer* v. *Nashawena Mills*, 52 N. E. (2d) 22 (Mass.) cited by petitioner (Pet. 25–27), are not in point. Both cases involved employees who refused to join the union holding the closed-shop contract.

D. C.), certiorari denied, 314 U. S. 674. Similarly, its argument that the settlement agreement required it to enter into the closed-shop contract does not meet the conclusion of the Board (R. 24) and of the court below (R. 349–350) that petitioner was not thereby compelled to violate the Act. Finally, petitioner's contention that the Board's decision is invalid insofar as it finds that petitioner illegally discriminated against the 12 employees who had not applied for membership in the Independent (Pet. 27, 38) is groundless. Since the contract itself was invalid because petitioner entered into it with knowledge that it was going to be used to discriminate against employees who were advocates of the Union, it could not be the legal ground for discharging any employee.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any important question warranting review. The petitions for writs of certiorari should therefore be denied.

Respectfully submitted.

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MAY 1944.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as

provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1944

Nos. 66, 67

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE WALLACE CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

[illegible] CLOTHESPIN & DISH WORKERS' UNION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

[illegible]IEF FOR THE NATIONAL LABOR RELATIONS BOARD

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NATIONAL LABOR RELATIONS BOARD

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 345–352) is reported at 141 F. (2d) 87. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1–31) are reported at 50 N. L. R. B. 138.

JURISDICTION

The decrees of the court below were entered on February 3, 1944 (R. 352, 371). Petitions for rehearing filed by The Wallace Corporation (herein called petitioner) and by Richwood Clothespin & Dish Workers' Union (herein called the Independent) were denied on March 13, 1944 (R. 353-356, 371-375). The petitions for writs of certiorari were filed April 24, 1944, and were granted May 29, 1944 (R. 376). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

Petitioner, the Union,[1] and the Independent entered into agreements with the Board's approval purporting to settle a labor dispute, including a strike, and charges filed with the Board by the Union alleging, *inter alia*, that petitioner had dominated, interfered with, and supported the Independent in violation of Section 8 (2) and (1) of the Act. As the result of a consent election held pursuant to the settlement agreements, the Independent was certified as the bargaining representative of petitioner's employees. Thereafter, petitioner entered into a closed-shop con-

[1] Local Union No. 129, United Construction Workers Organizing Committee, affiliated with the C. I. O.

tract with the Independent with knowledge that the Independent intended to use such a contract so that it could, by refusing membership to certain employees because of their prior activities in behalf of the Union, eliminate them from petitioner's employ. Petitioner then, acting pursuant to the closed-shop contract, discharged employees who had been refused membership in the Independent because of their previous adherence to the Union. The questions are:

1. Whether in the circumstances presented the Board in a subsequent unfair labor practice proceeding abused its administrative discretion in considering, and finding unfair labor practices based on, petitioner's entire course of conduct both before and after the settlement agreements and the certification of the Independent.

2. Whether petitioner by entering into and discharging employees pursuant to the terms of the closed-shop contract with the Independent violated Section 8 (3) and (1) of the Act.

3. Whether the Board's finding that petitioner dominated, interfered with and supported the Independent in violation of Section 8 (2) and (1) of the Act is supported by substantial evidence.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151 *et seq.*) are set forth in Appendix A, *infra*, pp. 79–85.

STATEMENT

Upon the usual proceedings pursuant to Section 10 of the Act, the Board issued its findings of fact, conclusions of law, and order (R. 1–31).[2]

The facts as found by the Board and shown by the evidence, may be summarized as follows:[3]

Petitioner is engaged in the manufacture of clothespins and other wood products at Richwood, West Virginia (R. 67). From the time the Union in July 1941 began to organize petitioner's employees, petitioner engaged in a counter-campaign of opposition. On the day the Union held its initial meeting Foreman McIlwee (R. 147) told a group of employees that M. B. Wallace, Jr., petitioner's president, had declared that he would close the plant and move it away rather than recognize the C. I. O. union. Foreman McIlwee urged the employees to attend the scheduled meeting and to oppose organization of petitioner's employees into the Union (R. 6–7; 164–166). On another occasion Foreman McIlwee warned employee Dodrill, one of the most active supporters of the Union and subsequently its president (R. 147, 150–151, 162), that employees who joined the Union would lose their jobs if Dodrill did not

[2] The Board issued its decision and order on June 7, 1943 (R. 1). Previously, the Board had vacated an earlier decision and order issued on February 27, 1943, and had heard reargument of the case on May 13, 1943 (R. 5).

[3] References preceding the semicolons are to the Board's findings; succeeding references are to the supporting evidence.

"quit agitating union and getting signers" (R. 7: 148, 164–165). Soon after Dodrill began his organizing activities he was questioned by Foreman Gibson about his union activities and was warned that President Wallace had declared that he "would never recognize the C. I. O." (R. 7; 147–148, 162–163). Foreman Harry White cautioned Dodrill that if he "did go ahead and organize * * * Wallace would not recognize the union that we would all be out of a job, he would shut the plant down and move it away * * *" (R. 7–8; 148–149, 166–167). Foreman White on other occasions told employee Griffie, who was an active union member, that "the C. I. O. would never operate in that plant" and that Mr. Wallace had so stated to Plant Manager Davis (R. 8; 74–76, 83–86). Similarly, Foreman Sleeth addressed anti-union remarks to Dodrill's wife, also an employee, and predicted that "the ones that did not sign up with the C. I. O. didn't have anything to worry about, that the company would see that they was taken care of" (R. 8; 117–119).

Early in September 1941 the Union asked petitioner for recognition as the bargaining representative of its employees (R. 9; 76). Petitioner, although challenging the Union's majority claim, refused the latter's offer to have its membership application cards checked against petitioner's payroll unless petitioner's plant manager were given an opportunity to question each employee individually with respect to his designation of the

Union (R. 9; 149–150, 154–155, 196–197). When the Union rejected this proposal, Plant Manager Davis suggested the holding of a Board election. The Union agreed, on condition that petitioner reinstate Dodrill, who had been discharged by petitioner in August (R. 9–10; 145, 150–151, 155–156, 198). Plant Manager Davis rejected this proposal on the ground that Dodrill "was too much of a union agitator" (R. 10; 151, 198). On September 25 the Union called a strike and established a picket line at the plant, which was shut down the same day (R. 10; 76, 151, 198).

With the advent of the strike petitioner launched the Independent. A group of employees arranged to meet at the home of Foreman Gibson on the night of October 2 for the purpose of forming an organization (R. 10–11; 76–77, 89–93, 135–137). On the appointed night Foreman Gibson met the group on the street and adjourned the meeting to the home of his assistant, Lundy Groves (*id.*), explaining that, "I can't have it at my house, there is too many C. I. O. members" (R. 90). Groves worked under Gibson and acted as foreman in Gibson's place when the latter was absent from the plant (R. 11–12; 78–79, 87–88, 96–97, 133–134, 208–210, 245). The Independent was organized at the meeting in the Groves' home. The organization was assisted by B. E. Thompson, a local newspaper editor, who was recommended to the group as an adviser by Irene Weese (R. 11–12; 89–94, 100–102, 116, 232–233, 237), petitioner's

paymaster and confidential secretary to Plant Manager Davis (R. 10; 217–218, 227–228). Thompson became the Independent's business manager (R. 100–102), but leadership among the employee participants in the organization was assumed by Groves, together with Reese and Smith, supervisory employees who held positions of responsibility with petitioner similar to Groves' (R. 11–12, 20; 95–96, 119–120, 126–131, 140–145, 153–154, 173–176, 186–187, 206–207, 210–216). All three men attended the initial organizing meeting of October 2, at Groves' home (R. 92–93), and all three became members of the Independent's bargaining committee which conducted negotiations with petitioner (R. 10–11; 55, 199–200). Both Groves and Reese were members of the board of directors of that organization (R. 20; 103), and Reese was its president at the time it first requested recognition by petitioner (R. 11; 199). Groves also solicited for the Independent during the strike (R. 13; 77–78).

On October 10, 1941, the Union filed charges with the Board, alleging, *inter alia*, that petitioner had violated Section 8 (2) of the Act by sponsoring the formation of the Independent (R. 12; 312–313).[1] On October 14, the Independent requested

[1] The charges also alleged that petitioner had discharged Harvey Dodrill because of his activities on behalf of the Union and had otherwise opposed the Union's organizing campaign, in violation of Section 8 (1) and (3) of the Act (R. 312).

recognition by petitioner as bargaining representative of the employees (R. 12; 199). On October 31, the Independent filed with the Board a petition for investigation and certification of representatives of petitioner's employees (R. 12–13; 292–293).

During the ensuing two and one-half months, representatives of petitioner, the Board, and the two unions engaged in negotiations looking toward settlement of the entire controversy, including disposition of the Union's charge and the Independent's petition (R. 13–14; 151–152, 157–159, 200–202, 271–275, 286, 293–296). Meanwhile the Independent's membership drive proceeded, coupled with a company-sponsored back-to-work movement. Petitioner mailed post cards to employees and sent foremen to their homes soliciting their return to work (R. 13; 97–98, 124–126, 180–183, 202–203, 311). Foreman Gibson, during this period, told a subordinate employee that he had "orders to go around and ask all the girls to go back to work. * * * the plant is going to open at 2 o'clock and if you don't come back you are off the pay roll" (R. 13; 97–98). Foreman White, after soliciting an employee to return to work, told her that the plant "will never run under the C. I. O." (R. 13; 124–125, 180–181). Assistant Foreman Lundy Groves, while soliciting one employee to join the Independent, declared, according to the latter's testimony, that "that was the

only way we was ever a-going to get back to work up there, if we ever got this thing settled we would have to settle it in that way" (R. 13; 77–78).

Between January 13 and 19, 1942, petitioner, the Independent, and the Union entered into agreements providing for termination of the strike, immediate resumption of operations at the plant, and an election to be conducted by the Board to determine whether either of the two unions represented a majority of petitioner's employees (R. 14–15; 53–59). The agreement provided further that if either union won the election, petitioner would enter into a "union shop" contract with it (R. 15; 55).[5] Finally, the election agreement provided for settlement and withdrawal of the Union's pending charges, in consideration of petitioner's promise not to dominate or interfere with the Independent or otherwise to interfere with its employees' rights under the Act (R. 15; 53–54).[6] At the election, held on January

[5] For the purposes of this case the parties have made no distinction between the terms "union shop" and "closed-shop." The provision in the settlement agreement referred to reads as follows (R. 55):

> "The Company further agrees that if either Union is proven to represent a majority of its employees by said vote, it will recognize a Union Shop, providing that the Company shall at all times retain the right to suspend, hire or discharge any employee for proper and just cause."

[6] In effecting the settlement, three documents were executed. The first, dated January 13, was signed by represent-

30, the Independent received a majority of the votes cast, and on February 4 it was certified by the Board's Regional Director as the exclusive collective bargaining representative of petitioner's employees (R. 18; 60).

Following the election petitioner and the Independent entered into bargaining negotiations. On February 28, the latter wrote to petitioner demanding a closed-shop contract as a necessary means of preserving its small majority against possible dissipation at the hands of those employees who preferred the Union (R. 18; 287–289). The letter stated that, since the election, petitioner had hired several new employees who "are favorable to the interests of our opponents", and that "if other similar-minded employees are given jobs in your plant, it won't be long until our majority of 15 will be either jeopardized or overcome." Declaring that the Independent in-

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atives of petitioner and of the two unions (R. 54–55). It provided that the strike would be terminated and operations resumed pending an election to be conducted by the Board, that petitioner and both unions would refrain from all forms of coercion and intimidation of employees, and contained the "union shop" provision referred to above (*id.*). The other two documents, dated January 19, were signed by representatives of the parties and approved by the Board's Regional Director (R. 54, 59). They provided for the holding of the election, withdrawal of the Union's charges, the reinstatement of Dodrill, and that petitioner would refrain from interfering with or coercing its employees or dominating the Independent (R. 53–54, 56–59).

Of the 186 valid votes cast the Independent received 98, the Union 83, and 5 votes were cast for neither (R. 60).

tended to use the proposed closed-shop agreement, not to require all employees to become members, but rather to remove from the plant employees who, prior to the election, had exercised their rights under the Act by participating in the Union's organizing campaign, the letter stated (R. 18; 288–289, italics added):

> The "Closed Shop" will, therefore, give us some control in preventing the hiring of additional employees who are unfavorable to our interests and who would further jeopardize our majority. It would also provide us with a legal means of disposing of any present employees, including Harvey Dodrill whom our members have declared by unanimous ballot that they will not work with, whose presence in the plant is unfavorable to our interests because *those who are so unfavorable will not be permitted to become members of our organization* and, without such membership they would not be permitted to work in the plant under a closed shop contract which we respectfully insist we MUST have.

On March 7, petitioner and the Independent executed a 2-year contract which provided that all present and future employees eligible for membership in the Independent "shall become members" within 10 days from the date of the contract or from date of hiring (R. 19; 61–66). On the same day a copy of the contract was posted in the plant (R. 19; 218–219). Thereafter, be-

tween March 7 and 18, 31 of the petitioner's employees who applied for membership in the Independent were rejected because of their past adherence to the Union (R. 19, 21–24; 82–83, 99, 152–153, 38). On March 16, petitioner posted a notice in its plant that, pursuant to the contract, only members in good standing in the Independent would be permitted to continue in petitioner's employ on and after March 18 (R. 19; 218, 291–292), and on the latter date it excluded from its plant and dismissed the 31 employees who had been rejected by the Independent, together with 12 other employees, former members of the Union, who had not applied for membership in the Independent (R. 19; 98–100, 152–153, 38).

Upon these facts the Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1), (2), and (3) of the Act (R. 27). The Board considered the effect of the settlement agreements, the consent election, and the certification of the Independent, and, in the exercise of its administrative discretion, determined that in view of the circumstances under which the closed-shop contract was executed, the purposes of the statute would be effectuated by considering petitioner's entire course of conduct, both before and after the settlement agreements and the certification (R. 21–22, 23–24). The Board concluded that the proviso to Section 8 (3) of the Act did not justify petitioner's conduct in entering into the closed-shop

agreement when it knew that the Independent intended to refuse membership to, and thus cause the discharge of, employees because of their previous adherence to the Union. The Board accordingly found that the closed-shop agreement was invalid and that petitioner's discharge of 43 employees pursuant thereto was discriminatory and in violation of Section 8 (3) and (1) of the Act (R. 21–24). Reviewing petitioner's conduct in its entirety, both before and after the settlement agreements, the Board also concluded that the Independent had been dominated in violation of Section 8 (2) and (1) of the Act (R. 19–21, 24, 27). Accordingly, the Board ordered petitioner to cease and desist from its violations of the Act, to cease and desist from giving effect to any contract between it and the Independent, to withdraw recognition from and disestablish the Independent as representative of any of its employees for collective bargaining purposes, to offer reinstatement with back pay to the 43 employees discriminated against, and to post appropriate notices (R. 28–36).

Thereafter petitioner and the Independent filed, in the court below, petitions to review and set aside the Board's order (R. 323–337, 358–368), and the Board filed its request that the order be enforced (R. 338–343, 369–370). On February 3, 1944, the court handed down its opinion and entered its decree enforcing the Board's order (R. 345–352, 371).

SUMMARY OF ARGUMENT

I. The Board did not abuse its administrative discretion in considering petitioner's entire course of conduct both before and after the settlement agreements and the certification of the Independent. Plainly, nothing in the settlement agreements or the certification of the Independent precluded the Board from inquiring into whether unfair labor practices had been committed subsequent to the certification of the Independent. As to unfair labor practices prior to the settlement agreements, it is within the Board's administrative discretion to go behind a previously approved settlement agreement, certification, or other means of adjusting a labor dispute, where the Board finds that such means of adjustment have ceased to serve the intended purpose of effectuating the policies of the Act. In view of the unlawful conduct of petitioner and the questionable conduct of the Independent, with respect to the making and giving effect to the terms of the closed-shop contract, the Board reasonably determined that the purposes of the Act would be effectively served if the Board considered the entire relationship between the two, both prior and subsequent to the settlement agreements and the certification. Furthermore, the settlement was in express terms conditioned upon petitioner's future compliance with the Act. Petitioner's subsequent violation of the law, in breach of the settlement, cleared the path for the Board to consider the entire controversy.

II. The Board properly found that the closed-shop agreement was invalid under Section 8 (3) of the Act for the reason that petitioner entered into and gave effect to the terms of the agreement when it knew that the Independent intended to refuse membership to employees because they had previously engaged in activities in behalf of the Union. The minority employees in the case at bar were denied membership in the Independent and were discharged by petitioner because they had exercised their right under the Act to engage in activities in support of the Union. The proviso to Section 8 (3) of the Act, which prescribes the narrow limits within which a closed-shop contract may be consummated, construed, as it must be, in the light of the policy and provisions of the Act as a whole, does not countenance an encroachment upon the basic rights the statute guarantees to employees. The language of the Act, its broad purpose, its legislative history, the opinions of experts in the labor relations field as to the true function of the closed-shop, and decisions of the courts, support the Board's view that Congress did not intend the closed-shop proviso to permit an employer and the bargaining representative selected by the majority of his employees in a proper unit to override the statutory right of individuals or minority groups of employees to engage in concerted activities. To allow an employer and the exclusive representative of his employees to discriminate against the minority

employees under the guise of a closed-shop agreement would be contrary to the policies of the Act and to public policy generally. The fact that petitioner had contracted, as part of the settlement agreement prior to the election, to enter into a closed-shop contract with whichever union won the election, cannot operate to defeat the purposes of the statute.

III. The Board's finding that petitioner dominated, interfered with, and supported the Independent in violation of Section 8 (2) and (1) of the Act is supported by substantial evidence, as the court below held. Following a period of open opposition on the part of petitioner to the Union's attempts to organize its employees, and to bargain with petitioner in their behalf, the Union called a strike. The Independent was organized and officered by petitioner's supervisory employees during the course of the strike to compete with the Union as a candidate for the employees' choice as their bargaining representative.

ARGUMENT

INTRODUCTION

The Board and the court below found that petitioner, by its conduct both before and after the settlement agreements and certification of the Independent, violated the Act (R. 21, 23–24, 348–351). Certain provisions of the Board's order are based primarily on unfair labor practices antedating the settlement agreements and can be

sustained only if the Board acted properly in going behind the settlement and certification. These are the provisions of the order, based on the finding that petitioner dominated the Independent, which require petitioner to cease and desist from dominating, interfering with, and contributing support to the Independent, to cease and desist from recognizing it and to take the affirmative action of withdrawing recognition (R. 28–29). The Board expressly rested its power to find that petitioner dominated the Independent on its determination that it could properly consider events occurring prior to the settlement (R. 21–24, 25–26), and the court below in sustaining this finding upheld the Board's power to go behind such agreements (R. 348–351).

The remaining provisions of the Board's order are based on events which occurred subsequent to the settlement and certification and can be sustained irrespective of whether the Board could go behind such settlement and certification.[5] These provisions of the order are based on the finding that petitioner violated the Act by entering into, and discharging employees pursuant to, the

[5] Of course, nothing in the settlement agreements or the certification of the Independent licensed petitioner to commit subsequent unfair labor practices or the Independent to benefit from such practices. We discuss a different point—the claimed bearing of the settlement agreements and the certification upon the question whether such subsequent unfair labor practices were in fact committed—under Point II, *infra*, pp. 69–70.

closed-shop contract and require petitioner to cease and desist from giving effect to the contract with the Independent, from encouraging membership therein, and from in any other manner interfering with, restraining and coercing its employees, and to take the affirmative action of offering reinstatement with back pay to the 43 employees discharged and of posting appropriate notices (R. 28–29). It is to be noted, furthermore, that if the Board had the right to consider the presettlement events, those provisions are valid irrespective of the issues raised as to the events occurring subsequent to the settlement, because the contract was made with a company-dominated union. The Board pointed out that its finding respecting company-domination supported its setting aside of the contract (R. 25–26), and the court below expressly held as an alternate basis for its decision that the conduct of the petitioner and Independent subsequent to the settlement and certification was so "high-handed" that, irrespective of whether it constituted an unfair labor practice, the Board properly considered the earlier events and these in turn sustained the full order (R. 348–349, 350–352).

Since the order can be sustained *in toto* only if the Board is not estopped by agreement or otherwise from resting its decision upon all the facts in the case, we shall discuss under Point I (pp. 19–32, *infra*), the effect of settlement agreements and certifications. Under Point II (pp. 33–72,

infra), we shall argue that petitioner's conduct in entering into, and discharging the 43 employees pursuant to, the closed-shop contract violated Section 8 (3) and (1) of the Act, irrespective of whether the Independent was an employer-dominated organization. Under Point III (pp. 72–78, *infra*) we shall show that petitioner dominated the Independent in violation of Section 8 (2) and (1) of the Act.

I

THE BOARD DID NOT ABUSE ITS ADMINISTRATIVE DISCRETION IN CONSIDERING AND BASING FINDINGS OF UNFAIR LABOR PRACTICES UPON PETITIONER'S ENTIRE COURSE OF CONDUCT BOTH BEFORE AND AFTER THE SETTLEMENT AGREEMENTS AND CERTIFICATION OF THE INDEPENDENT, AND FINDING THAT PETITIONER THEREBY COMMITTED UNFAIR LABOR PRACTICES

Nothing in the National Labor Relations Act prevents the Board from disregarding a settlement agreement or a certification when it deems such action in harmony with the purposes of the statute.* The Board found that petitioner had continued to violate the statute, subsequent to the settlement agreements and the certification, and deemed itself justified in basing its determination

* Section 10 (a) of the Act provides that the Board's power "to prevent any person from engaging in any unfair labor practice" by means of the formal procedure set out in Section 10, "shall be exclusive, and *shall not be affected by any other means of adjustment* or prevention that has been or may be established by agreement, code, law, or otherwise" (italics supplied).

of unfair labor practices upon petitioner's entire course of conduct, including events antedating the settlement. The Board's position in this respect can be supported on two grounds: (a) that under general principles of administrative law it is proper for the Board in carrying out the purposes of the Act to disregard an agreement designed to settle prior charges when the unfair labor practices continue, and (b) that here the settlement agreements themselves were conditioned upon petitioner's future compliance with the Act, so that the agreements became inoperative as a settlement when further violations of the Act occurred.

A. The Board's experience has led it to make extentive use of the amicable adjustment of disputes as a substitute for formal action. In many cases the Board can more effectively enforce the policies of the Act by settling charges of unfair labor practices, upon agreement of the parties, than it can by proceeding formally against the employer. In such cases the Board concludes that the time saved in settling the controversy quickly, the public expense avoided, and the reasonable assurance of substantial compliance with the purposes of the statute, compensate for accepting less than the complete compliance which might result from a formal proceeding. It is felt that the practice, in its over-all use, goes far to obtain the declared objective of the Act to assure employees of their right to self-organization and to encourage "practices fundamental to

the friendly adjustment of industrial disputes" (Section 1 of the Act, *infra*, pp. 79–80). By accomplishing the "rapid removal" of such disputes "from the area of possible industrial conflict * * * the benefits of such settlements have accrued to the employers and employees directly involved, as well as to the general public" (National Labor Relations Board, *First Annual Report* (1936), p. 31).[10]

Settlements generally are arranged by the Board's agents working in the field and are likely

[10] The Board's extensive use of settlements to terminate disputes, either in the course of formal proceedings or where no formal action has been taken, and the importance of the settlement device in the administration of the Act, are shown in the Board's Annual Reports. See *First Annual Report* (1936), pp. 30–31 (45 percent of all cases closed were settled); *Second Annual Report* (1937), pp. 15–17 (60 percent of all cases closed were settled); *Third Annual Report* (1938), pp. 20–22 (52 percent of all cases closed were settled; of the 4,621 cases settled, 2,972, or 64 percent, involved unfair labor practices); *Fourth Annual Report* (1939), pp. 19–22 (47 percent of all cases closed were settled; of the 3,069 cases settled, 2,072, or 67 percent involved unfair labor practices); *Fifth Annual Report* (1940), pp. 14, 16–18, 20, 26 (39 percent of all cases closed were settled; of the 2,888 cases settled, 1,877, or 65 percent, involved unfair labor practices); *Sixth Annual Report* (1941), pp. 14–15, 25, 26, 27, 29 (50 percent of all cases closed were settled; of the 4,283 cases settled, 2,142, or 50 percent, involved unfair labor practices); *Seventh Annual Report* (1942), pp. 22–25, 28–30, 80–86 (51 percent of all cases closed were settled; of the 5,968 cases settled, 2,450, or 41 percent, involved unfair labor practices); *Eighth Annual Report* (1943), pp. 20–23, 91, 92 (47 percent of all cases closed were settled; of the 4,592 cases settled, 1,358, or 30 percent, involved unfair labor practices).

to come directly to the Board's attention only in the comparatively few instances where a disagreement arises concerning them. Where such disagreements do arise, however, in order to encourage the friendly settlement of disputes, and to foster confidence in its agents on the part of management and labor, the Board has, by custom, established a working rule that where a settlement agreement approved by a Board agent is adhered to by the parties the Board will respect its terms and will not go behind such agreement to investigate or prosecute unfair labor practices alleged to have occurred prior thereto.[31] At the same time the Board has consistently held that where subsequent events show that a settlement or other adjustment is not accomplishing the purposes of the Act, because the employer violates or continues to violate the Act after entering into it, the Board will disregard such agreement and consider the employer's entire course of conduct both before and after the agreement was executed.[32]

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[31] *Matter of Corn Products Refining Co.*, 22 N. L. R. B. 824, 828–829; *Matter of Wickwire Brothers*, 16 N. L. R. B. 316, 325–326; *Matter of Godchaux Sugars, Inc.*, 12 N. L. R. B. 568, 576–579; *Matter of Shenandoah-Dives Mining Co.*, 11 N. L. R. B. 885, 888; cf. *Matter of the Locomotive Finished Material Company*, 52 N. L. R. B. 922, 927.

[32] *Matter of the Locomotive Finished Material Company*, 52 N. L. R. B. 922, 926–928; *Matter of Chicago Casket Company*, 21 N. L. R. B. 235, 252–256; *Matter of Harry A. Halff*, 16 N. L. R. B. 667, 679–682; cf. the *Wickwire* decision cited in footnote 11, *supra*.

The Board's practice in this respect has been recognized by the courts as properly within the Board's administrative discretion.[13] It is "a fun-

[13] As to settlements, see: *Sperry Gyroscope Co. v. National Labor Relations Board*, 129 F. (2d) 922, 926, 931 (C. C. A. 2); *National Labor Relations Board v. F. W. Phillips Gas & Oil Co.*, 141 F. (2d) 304 (C. C. A. 3); *National Labor Relations Board v. Hawk & Buck Co.*, 120 F. (2d) 903, 904–905 (C. C. A. 5); *National Labor Relations Board v. Prettyman*, 117 F. (2d) 786, 792 (C. C. A. 6); *National Labor Relations Board v. General Motors Corp.*, 116 F. (2d) 306, 312 (C. C. A. 7); *National Labor Relations Board v. Thompson Products, Inc.*, 130 F. (2d) 363, 366–367 (C. C. A. 6); *Canyon Corp. v. National Labor Relations Board*, 128 F. (2d) 953, 955–956 (C. C. A. 8).

For decisions holding that representation proceedings, whether or not they culminate in the certification of a bargaining representative, neither estop the Board from subsequently investigating and prosecuting charges of unfair labor practices alleged to have occurred prior thereto, nor constitute *res judicata* of such charges, see: *Warehousemen's Union v. National Labor Relations Board*, 121 F. (2d) 84, 92–94 (App. D. C.), certiorari denied, 314 U. S. 674; *Magnolia Petroleum Co. v. National Labor Relations Board*, 115 F. (2d) 1001, 1012–1013 (C. C. A. 10); *Utah Copper Co. v. National Labor Relations Board*, 139 F. (2d) 788, 791 (C. C. A. 10), certiorari denied, 64 S. Ct. 946, *sub nom. Independent Ass'n of Mill Workers v. National Labor Relations Board*; *National Labor Relations Board v. Swift & Co.*, 127 F. (2d) 30, 31 (C. C. A. 6); *National Labor Relations Board v. Standard Oil Co.*, 142 F. (2d) 676 (C. C. A. 6), enforcing with modifications 47 N. L. R. B. 517, petition for certiorari pending, No. 204, this Term; *National Labor Relations Board v. Stone*, 125 F. (2d) 752, 756–757 (C. C. A. 7), certiorari denied, 317 U. S. 649; cf. *National Labor Relations Board v. Sun Shipbuilding and Dry Dock Co.*, 135 F. (2d) 15, 18, 23 (C. C. A. 3).

Cf. *United States v. City and County of San Francisco*, 310 U. S. 16, 31–32; *Utah Power & Light Co. v. United States*, 243 U. S. 389, 408–409.

damental conception of our law * * * [that] there can be no rule which would restrict the Board from an appropriate inquiry into a pending complaint * * * [and that] the extent to which the Board may refuse to go into matter raised by a complaint, either because the matter is stale or because it has been satisfactorily concluded theretofore, must rest in the Board's discretion." *National Labor Relations Board* v. *T. W. Phillips Gas & Oil Co.*, 141 F. (2d) 304, 305–306 (C. C. A. 3). We submit that to hold otherwise would be contrary both to the provisions of Section 10 (a) and the purpose of the statute to prevent interruptions to commerce.

B. Even if the case were merely a matter between private parties, however, petitioner would be in no position to complain. It will be noted that the settlement specifically provided that petitioner, "on condition that [the Union] agrees to withdraw the charge", agreed "in no wise to interfere with, restrain or coerce its employees in the rights guaranteed in Section 7 of the National Labor Relations Act; * * * in no wise to dominate or interfere with the administration of the Richwood Clothespin and Dish Workers' Union * * *" (R. 53); and "not to coerce or intimidate any of its employees in regard to Union membership" (R. 54). The Union, on its part, agreed to "request withdrawal and hereby does request withdrawal of said charge on condition that [petitioner] fully and faithfully complies with this

agreement * * *" (R. 53–54). Thus the settlement was in terms conditioned upon petitioner's future compliance with the Act. After the charge was withdrawn (R. 15), and while the Board and the Union were complying with the terms of the settlement, petitioner entered into and gave effect to the closed-shop agreement with the knowledge that the Independent intended to use the agreement to deprive employees of their jobs because they had previously supported the Union. If, as we contend (Pt. II, *infra*, pp. 33–72), such conduct was in violation of Section 8 (1) and (3) of the Act, it constituted a breach of an essential condition of the contract.

Upon these facts the Board's action in upsetting the settlement finds full support in the general principles of contract law without regard to the Board's peculiar powers as an administrative agency of the Federal Government. Whether the settlement be regarded as in the nature of a compromise, an accord and satisfaction, or an ordinary bilateral contract, the applicable principle is clear. Where one party to a contract fails in the performance of a material part of his promise, or fails to satisfy a substantial condition, the other party is relieved of further performance and may treat the contract as terminated.[14] "By the general principles of

[14] See 3 Williston on Contracts (Rev. Ed.) Secs. 813, 831, 841; and 6 *id.* Sec. 1848.

contract an open cessation of performance with the intent to do no more, even if justified, excuses the other party from further performance on his side." *The Eliza Lines*, 199 U. S. 119, 129; *Rochm* v. *Horst*, 178 U. S. 1, 8; *Farmers' Loan and Trust Co.* v. *Galesburg*, 133 U. S. 156, 179; *Phillips and Colby Construction Co.* v. *Seymour* 91 U. S. 646, 649. Similarly, the "breach of * * * a dependent covenant, one which goes to the whole consideration of the contract gives to the injured party the right to treat the entire contract as broken * * *." *Kauffman* v. *Raeder*, 108 Fed. 171, 179 (C. C. A. 8), certiorari denied, 191 U. S. 567; *Sylvania Industrial Corp.* v. *Lilienfeld's Estate*, 132 F. (2d) 887, 891–892 (C. C. A. 4); *Knutson* v. *Metallic Stab. Form Co.*, 128 F. (2d) 408, 411 (C. C. A. 5); *Fore River Shipbuilding Co.* v. *Southern Pacific Co.*, 219 Fed. 387, 393 (C. C. A. 1). And a party "asserting that the contract [is] still in force, [is] bound to show such performance on his part as [would entitle] him to demand performance on [the other party's] part." *Norrington* v. *Wright*, 115 U. S. 188, 205; *Lamborn* v. *National Bank of Commerce*, 276 U. S. 469, 472; *New York Life Insurance Co.* v. *Viglas*, 297 U. S. 672, 679–680; *City of Columbus* v. *Mercantile Trust and Deposit Co. of Baltimore*, 218 U. S. 645, 660–661. To the same effect, a party seeking to avail himself of a compromise must show performance

on his part (*Brown* v. *Spofford*, 95 U. S. 474, 484) and "if part of the consideration agreed on be not performed, the whole accord fails." *First National Bank of Arkansas City* v. *Leech*, 94 Fed. 310, 311 (C. C. A. 8); *City of Memphis* v. *Brown*, 20 Wall. 289, 308–309; *Shubert* v. *Rosenberger*, 204 Fed. 934, 938 (C. C. A. 8); *Unterinyer* v. *Bowers*, 79 F. (2d) 9, 11 (C. C. A. 2); *The Joy*, 290 Fed. 407, 408 (E. D. N. Y.).

Applying these principles to the case at bar, it is clear that when petitioner violated the Act subsequent to the settlement agreement it failed in the performance of a most material part of the consideration it had promised in return for the settlement and thereby breached the settlement agreement and relieved the Board and the other parties thereto from any obligation to give it effect. The condition placed by the Union on its withdrawal of the charge of past violation (i. e., that petitioner comply in the future with the agreement and the Act) could have no significance if the Union were not relieved of its obligation and thereby rendered free to press its original charge anew if the company again violated the Act. Petitioner thus is in no position to advance the settlement agreement as a shield against accountability for its wrongful conduct prior thereto. Nor is the Independent in any better position than petitioner to complain of the Board's refusal to observe the terms of the settle-

ment after the agreement had been breached. As the court below declared (R. 351), the "high-handed conduct of the Independent" was "in violation of the clear spirit of the compromise agreement * * *."

We submit that a consideration of the problem with which the Board was faced, and of the circumstances under which it arose, demonstrates the complete reasonableness of the solution which the Board adopted. The problem was, first, whether petitioner by entering into the closed-shop contract with knowledge that the Independent intended to use the contract to expel former union adherents from the plant, and by discharging 43 employees pursuant to the contract, violated Section 8 (3) of the Act. Having found against petitioner on this point (R. 21–24), the Board's problem remained how fully to remedy the wrong done and how to dispose of the Union's charge, based principally upon events alleged to have occurred prior to the settlement and the certification of the Independent, namely, that petitioner had dominated and supported the Independent in contravention of Section 8 (2) of the Act.

If the Board had followed the course advocated by petitioner, and allowed the settlement and certification to stand, it would have left the employees with an officially approved exclusive bargaining representative which, in the Board's

view, had been dominated and supported by petitioner prior to the settlement and had, subsequently thereto, forced the unfair and illegal result of the closed-shop agreement, so as to penalize the former union adherents for having exercised their rights under the Act (*infra*, pp. 33–42, 72–78). In the face of the questionable conduct of both petitioner and the Independent with respect to the closed-shop agreement, the Board was asked to close the door to an exploration of the entire relationship between the two. Moreover, it was asked to sustain the settlement and certification despite its conclusion that, far from serving their intended purpose to effectuate the policies of the Act, they were in fact being used as the allegedly lawful excuse for an absolute frustration of that purpose (*infra*, pp. 33–42, 69–70).

We submit that the Board acted altogether reasonably in deciding that it should not, for the sake of sustaining its past administrative determinations, which had not been complied with, sacrifice the statutory rights of petitioner's employees. Certainly the Board's refusal to do so cannot be called arbitrary or capricious.

This is not to say that the Board may ignore the "fundamentals of fair play." On the contrary, they are elemental to the administrative process. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 143; *Jefferson Electric Co.* v. *National Labor Relations*

Board, 102 F. (2d) 949, 954 (C. C. A. 7). But "fair play," even in disputes between private parties, entails a weighing of conflicting interests. The case at bar, however, affects the private interests of petitioner, its employees, the Union, and the Independent only incidentally. Dominant over these is the public interest in the enforcement of the policies of the Act. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265–269; and authorities cited *infra*, p. 65. And it is fundamental that where private interests clash with the public interest the former must yield. Hence, petitioner here was entitled, not to abstract "fair play" with respect to its private interests as against other private interests affected, but to the "fair play" which the public interest, as embodied in the Act, would, in all the circumstances, permit." The Board,

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Thus, the fact that petitioner had relied upon the settlement agreement and the certification of the Independent in entering into the closed-shop agreement with the latter was but one of the many considerations the Board had to weigh in determining whether the threat to the purposes of the Act, inherent in the situation, was sufficiently serious to warrant setting aside the settlement agreement and the certification. Similarly, whatever hardship may have fallen upon petitioner as a result of the Board's final action was but one of the factors for the Board to consider. It could not be the controlling consideration. *National Labor Relations Board* v. *Hudson Motor Car Co.*, 128 F. (2d) 528, 533 (C. C. A. 6); *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. (2d) 748, 752 (C. C. A. 7), certiorari denied, 313 U. S. 565; *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. (2d) 465, 470 (C. C. A. 9); cf. *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467, 474.

in the exercise of its administrative discretion, was required to resolve the conflict, and we submit that the Board reasonably determined that the policies of the Act, and the public interest therein effectuated, would be served effectively in the case at bar by setting aside the settlement and certification and considering the entire course of petitioner's conduct and its relations with the Independent. It follows, of course, that the Board, upon such consideration having found that petitioner violated the Act within the meaning of Section 8 (1), (2), and (3), was not barred by the settlement and certification from prescribing the normal remedy therefor.

Manifestly the foregoing argument supports the Board's action in upsetting the settlement and certification[15] only if the Court approves the Board's finding that petitioner violated the Act by executing the closed-shop agreement with the Independent, since that was the only unfair labor practice the Board found petitioner had engaged in subsequent to the settlement agreement. We are of the opinion, however, as was the court below, that the narrow ground upon which the Board based its determination to upset the settle-

[15] Of course, if it was proper for the Board to go behind the settlement and find that the Independent was dominated and interfered with in violation of Section 8 (2) of the Act, the certification of the Independent automatically became invalid.

ment and certification (R. 21–24) need not be the test of the propriety of its action. We believe that the Board's powers of administrative discretion furnish a broader test and that the unusual circumstances of this case, involving, as they did, questionable conduct by both petitioner and the Independent, justified the Board's exploration of the entire affair regardless of whether or not the making of the closed-shop agreement subsequent to the settlement be considered unlawful. The court below declared that (R. 350–351):

> * * * even if discharges such as those here involved be not considered of themselves unfair labor practices within the meaning of the act, we think that the Board was justified under the circumstances, notwithstanding the agreement that had been made and the certification of the Independent, in going fully into the question of company domination and holding the Independent to be a company-dominated union and hence not entitled to invoke the closed-shop provision. * * * [The] high-handed conduct of the Independent union here, is in violation of the clear spirit of the compromise agreement as well as of the rights of the minority, and the acquiescence of the company in that conduct, furnished ample justification for the Board to inquire fully into the history of the union * * *.

II

THE CLOSED-SHOP AGREEMENT WAS INVALID UNDER SECTION 8 (3) OF THE ACT BECAUSE PETITIONER ENTERED INTO AND GAVE EFFECT TO THE TERMS OF THE AGREEMENT WHEN IT KNEW THAT THE INDEPENDENT INTENDED TO REFUSE MEMBERSHIP TO EMPLOYEES BECAUSE THEY HAD PREVIOUSLY ENGAGED IN ACTIVITIES IN BEHALF OF THE UNION

There is no question but that the purpose and effect of the closed-shop agreement was to discriminate against employees because they had exercised their lawful right to engage in activities in behalf of the Union. The Board found (R. 23) that the agreement was not intended to achieve the lawful purpose "merely to require employees to seek membership in the Independent as a condition of employment," but that, on the contrary "its real purpose" was, as petitioner knew, "to bar from future employment with the [petitioner] persons who had adhered to the charging Union in the election campaign." The Board found further (R. 19, 24) that 31 employees applied for, and were refused membership in the Independent because of their previous support of the Union and that they were therefore discharged by petitioner.[17] The court below affirmed this determination (R. 347–348). Contrary to

[17] The Board found that petitioner unlawfully discharged a total of 43 employees, all former members of the Union, pursuant to the terms of the illegal closed-shop agreement (R. 24). Of these, 31 had applied for and had been refused membership in the Independent, as noted above, and 12 had never applied for such membership (R. 19, 24). But since the Board found the closed-shop agreement invalid *ab initio*

petitioner's assertions (Br. 39–47), there is substantial evidence that at the time of the discharges petitioner had ample reason to believe that the employees had been excluded from membership pursuant to the policy announced by the Independent in its letter to petitioner of February 28, 1942, and that a substantial number of the 43 had actually applied for membership and been rejected (R. 287–289, 300, 307–308, 224; *supra*, pp. 10–12).

It cannot seriously be contended that petitioner, when it made the closed-shop agreement, was not aware of the true purpose of the Independent to exclude supporters of the Union from future employment. As the court below held (R. 347), "the Independent * * * clearly indicated to the Company that one of the purposes of such agreement was to get rid of employees who were unacceptable because of prior union activities."[18] In view of this knowledge on the part of the com-

the discharge of any employee pursuant thereto was necessarily discriminatory and in violation of Section 8 (3) of the Act (R. 24).

[18] Thompson's letter of February 28 (*supra*, pp. 10–11) demanded a closed-shop contract on the ground that it was the "only protection * * * available" to the Independent against dissipation of its small majority, since it not only would "give us some measure of control in preventing the hiring of additional employees who are unfavorable to our interests," but "would also provide us with a legal means of disposing of any present employees, including Harvey Dodrill * * * whose presence in the plant is unfavorable to our interests * * *." The letter then plainly stated that the Independent would refuse membership to such "unfavorable" employees and thereby foreclose their employment (R.

pany of the Independent's plan it is of no consequence whether the company knew previously which of the 43 employees had made application to the Independent and been rejected. The number of persons to be discharged itself would have put the company on notice that the Independent had been carrying out its previously announced policy. The question is whether the proviso to Section 8 (3) of the Act permits the discrimination in which petitioner has engaged. The Board held that it does not.

A. THE PROVISO TO SECTION 8 (3) DOES NOT COUNTENANCE AN ENCROACHMENT UPON THE BASIC RIGHTS THE STATUTE GUARANTEES TO EMPLOYEES

Section 8 (3) of the Act makes it an unfair labor practice for an employer——

> By discrimination in regard to hire or tenure of employment or any term or con-

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288–289). The naming of Dodrill, the Union's president and leading organizer and a "union agitator" in the eyes of petitioner (*supra*, p. 6); left the intention and purpose of the Independent unmistakably clear.

That the Independent in fact carried out its intention is equally clear, not only from Thompson's letter, but from the fact that all of the 31 employees whose applications for membership were rejected were members of the Union. (R. 82–83, 99, 152–153, 38). Nor does the fact that some former union adherents were admitted to membership in the Independent (R. 122–123, 191–192) alter the picture. The purge instituted by the Independent was so sweeping that it could accomplish its aim without complete precision in execution. Cf. *National Labor Relations Board* v. *American Manufacturing Co.*, 106 F. (2d) 61, 67–68 (C. C. A. 2), affirmed, 309 U. S. 629; *Stonewall Cotton Mills* v. *National Labor Relations Board*, 129 F. (2d) 629, 633 (C. C. A. 5).

> dition of employment to encourage or discourage membership in any labor organization:

The subsection then contains the following proviso:

> *Provided*, That nothing in this Act * * * shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

Under the language preceding the proviso, there can be no question but that the discharge of the 43 employees constituted a forbidden discrimination. The Board's findings make it clear that the scheme of the Independent was to deny membership to these individuals, and thus to exclude them from employment because of their past adherence to the Union. It is true that this plan did not originate with petitioner, but it is likewise true that petitioner did acquiesce in the Independent's proposal and did make itself the instrument for its effectuation. On principle and under the uniform decisions of the Circuit Courts of Appeals, the statutory test of discrimination is thus satisfied. *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. (2d) 465, 470 (C. C. A. 9); *National Labor Relations Board* v. *Hudson Motor*

Car Co., 128 F. (2d) 528, 532–533 (C. C. A. 6); *National Labor Relations Board* v. *Gluck Brewing Co.*, decided August 7, 1944 (C. C. A. 8); *South Atlantic Steamship Co.*, v. *National Labor Relations Board*, 116 F. (2d) 480 (C. C. A. 5), certiorari denied, 313 U. S. 582.

The proviso equips the employer with a defense against such a charge of discrimination in narrow circumstances. The proviso does not, of course, attempt directly to control the internal affairs of labor organizations or the conditions under which they may deny membership to employees or expel those who have become members. Such controls the statute leaves where it found them, in the states. But the proviso, in describing the circumstances under which an employer may defend against a charge of discrimination, affects union conduct indirectly in denying to labor organizations benefits under the National Labor Relations Act which might otherwise be open to them. This does not mean that an organization lacks the power to determine its own membership qualifications without restriction, subject only to state law, but it may mean that if an organization wishes to exercise the right under the federal statute to act as exclusive representative of a bargaining unit it must give up such of its former prerogatives as would permit it to discriminate against members of the unit it purports to represent.[19] In applying the proviso the ques-

proposition (Br. 52) "that a union has exclusive control of

[19] Petitioner cites a number of state decisions for the

tion is not whether a labor organization is free under the law of any particular state to permit or deny membership on its own uncontrolled terms, but whether the language of the proviso permits the conduct under scrutiny, when knowingly participated in by an employer, to serve as a defense to what would otherwise be a violation of Section 8 (3).

Literally, the proviso protects "an agreement with a labor organization * * * to require as a condition of employment membership therein." An agreement under which all persons within the unit are required to become members of the contracting union, and only those who, of their own choice fail to join are then excluded from further employment, is clearly within the quoted language.

This is the ordinary closed-shop agreement, and the Board has not suggested that such a contract would be invalid. But that was not the object of the agreement here, nor the manner in which it was performed. Here the Independent, with petitioner's knowledge, executed the agreement not

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admission to its own membership." Although this may be true as a general matter (but see *Cameron* v. *International Alliance*, 118 N. J. Eq. 11 (1935)) it does not follow that Congress intended the closed shop proviso to protect anything lawful in the states, no matter how inconsistent with the policy of the Act. Furthermore the state cases cited by petitioner on their face do not indicate that a closed shop entered into for the purpose of exclusion of employees in the opposing Union would be valid. At the very least, there is not sufficient authority dealing with any such problem to warrant a generalization as to the state rule.

in order to bring all the employees within the organization but to keep a substantial number of them out; and this solely on the basis of the past exercise by these employees of rights granted under the Act. Such an arrangement goes beyond the traditional closed-shop which the proviso was designed to protect—the *requirement* of membership.

Conceivably, the proviso could be read to give the contracting union and the employer unrestrained license to exclude from employment any person denied membership for any reason or no reason. But the provision need not be so construed, for its language shows that Congress was concerned with a contract aimed at bringing all employees into an organization. Otherwise, as here, the right to require membership as a condition of employment may be converted into a blanket right to deny membership so as to exclude from employment. The other provisions of the Act, as well as the other pertinent guides to statutory construction, support a restrictive reading of the proviso, and, in turn, furnish guides as to the validity of the terms of membership here imposed.[20]

Accordingly, the Board, exercising its duty to give effect to the policies of the Act generally,

[20] Also, to the extent that the Independent was deliberately discriminating against employees in the bargaining unit, it was not acting as their "representative," within the meaning of the proviso. The provisions for majority representation

looked, not alone at the language of the proviso, but interpreted that language in its relation to the statute as a whole (R. 22).[21] In so doing the Board properly said "the proviso relating to the closed-shop is not a severable and separate portion of the Act. It must be construed in the light of the statutory statements of policy and the general provisions of the Act * ** * the express purpose [of which] is to insure employees of their right to self-organization and a free choice of representatives" (R. 22).

In the light of the entire statute, the Board concluded that the proviso to Section 8 (3), which prescribes the only conditions under which a lawful closed-shop agreement may be made (*supra*, p. 36), sanctions neither the making of a closed-shop agreement under the circumstances here present, nor the result achieved (R. 21–22). The

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in Section 9 (a) would seem to impose upon the representative a duty to act on behalf of all the members of the bargaining unit equally and in good faith. Accordingly, it can be said that the Independent lost its standing as representative under Section 9 (a) by reason of the conduct in question; and only a "representative of the employees as provided in section 9 (a)," is permitted to take advantage of the proviso in Section 8 (3). The Board did not base its decision on this theory, but we call it to the Court's attention as additional support for the decision reached. See *infra*, pp. 47–55, 59–69.

[21] *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 266; *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82.

Board held, as it had in two earlier cases,[2] that the proviso does not countenance the use of a

[2] In *Matter of Rutland Court Owners, Inc.*, 44 N. L. R. B. 587, 46 N. L. R. B. 1040, the Board held that a valid closed-shop contract did not protect an employer where the contracting union persuaded the employer to discharge certain employee members of the union because, shortly before the expiration of the contract, they indicated their intention to seek representation by another union. The Board there stated that, "We cannot allow the declared intention of Congress to be evaded by permitting an employer and a union thus to combine to preclude the employees from expressing their choice. The proviso in Section 8 (3) cannot therefore be considered as an instrument for depriving employees of their statutory right to select another representative for a period succeeding the term embraced by the closed-shop contract" (46 N. L. R. B. at 1042).

In *Matter of Monsieur Henri Wines, Ltd.*, 44 N. L. R. B. 1310, a majority of the employees in an appropriate bargaining unit applied for membership in a union, thereby designating it as their representative for collective bargaining purposes. The union persuaded the employer to enter into a closed-shop contract, both the employer and the union knowing that the latter intended to reject the employees' applications for membership thereby excluding them from employment, and to have the employer replace them with new employees who were members of the union. The Board found that (p. 1318) "the purport of the agreement was to close the shop against [the employees] and to distribute their jobs to non-employee members of" the union. It concluded, therefore, that the agreement and the subsequent discharge of the employees who were denied membership in the contracting union were not in conformity with the proviso to Section 8 (3), since the union had repudiated its representative status and the agreement was "not the culmination of bona fide collective bargaining between an employer and a labor organization acting as the exclusive representative of his employees, within the meaning of Section 9 (a), but

closed-shop agreement "as an instrument for effecting discrimination against * * * employees solely because of their prior union activities," or "to penalize employees whose choice of representatives was not that of the majority," or to "deprive employees of their statutory right to select bargaining representatives" (R. 21–23). The broad purpose of the statute, its language, its legislative history, the opinions of experts in the labor relations field as to the function of the closed shop, and decisions of the courts, support the limited construction which the Board (R. 21–23) and the court below (R. 349–350) placed upon the closed-shop proviso.[25]

The purpose of the Act.—The declared objective of the Act, as the Board observed (R. 22), is to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing" for the purpose of collective bargaining, and to encourage "practices fundamental to the friendly adjustment of industrial disputes." (Section 1

[was] an unlawful device for depriving the employees of their jobs" (44 N. L. R. B., at 1318–1319).

[25] In view of the limiting terms of the proviso (*National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, 694–695) a narrow construction is proper. *United States* v. *Scharton*, 285 U. S. 518, 521–522; *United States* v. *McElvain*, 272 U. S. 633, 639; *United States* v. *Dickson*, 15 Pet. 141, 165.

of the Act).[24] And freedom from fear on the part of the employees that they will suffer from the assertion of their organizational rights is recognized as an element essential to the achievement of that objective.[25] Employees will not be assured of the freedom to organize and select representatives of their own choosing, however, if

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[24] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33–34; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 182–183; *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U. S. 146, 165–166; *National Labor Relations Board* v. *Wamhoff Mills, Inc.*, 114 F. (2d) 226, 232–234 (C. C. A. 1); *National Labor Relations Board* v. *Reth Packing Co.*, 115 F. (2d) 217, 219 (C. C. A. 8).

[25] The reinstatement and back-pay provisions of Section 10 (c) of the Act are designed to just this end. Thus the Circuit Court of Appeals for the Eighth Circuit has noted, in *National Labor Relations Board* v. *Killoren*, 122 F. (2d) 609, 612, that it is necessary "* * * for the workmen in industry generally to feel assured that they would be protected, as fully as soundly possible, not merely in the exercise of their right of self-organization and designation of representatives of their own choosing, but against the economic consequences of a legitimate assertion of those rights. The experience of the Board, as reflected in its decisions, demonstrates the need for this assurance." Similarly this Court said in *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 541, that "If employees have some assurance that an employer may not with impunity impose upon them the cost of maintaining an organization which he has dominated, any more than he can make them bear the burden of a discriminatory discharge, they may be more confident in the exercise of their statutory rights."

they know that, in a situation where more than one union has secured a following among them, those who choose the wrong candidate may be discharged. On the contrary, if the employer and the majority representative were free to enter into a closed-shop contract designed to discriminate against the defeated minority group of employees, the freedom of the employees to choose a representative would be impaired. In all cases where it appeared likely, or even possible, that a closed-shop agreement might follow the selection of a majority representative, the employees would be impelled to speculate as to which organization would ultimately win the support of the majority in order to avoid becoming marked as supporters of the minority group. The employees' right to support and select the bargaining representative he wanted would be reduced to the right to guess which of two or more competing unions would ultimately be chosen by the majority. And they would make their selection at their peril. In holding that this result would be contrary to the fundamental purpose of the Act the Board has applied a reasonable and realistic interpretation both to the proviso to Section 8 (3) and to the Act as a whole.

The legislative history—The Congressional intent in writing the proviso to Section 8 (3) into the Act was not to legalize or encourage the adoption of the closed-shop generally, but to achieve the

very different purpose of preserving the *status quo* in the matter of the legality of closed-shop contracts under the laws of the several States, with the exception that such contracts thenceforth were to conform to the requirements of the Act, where the employer was subject to its jurisdiction. Both the Senate and House Committee reports state that Section 7 (a) of the National Industrial Recovery Act [26] had resulted in confusion and misunderstanding as to the legal status of the closed-shop contract and that the proviso to Section 8 (3) of the National Labor Relations Act was designed to clarify its status.[27]

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[26] Section 7 (a) of the National Recovery Act (48 Stat. 195, 198–199) read, in part, as follows:

"* * * no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing. * * *"

[27] The Senate Committee stated: "The reason for the insertion of the proviso is as follows: According to some interpretations, the provision of section 7 (a) of the National Industrial Recovery Act, assuring the freedom of employees 'to organize and bargain collectively through representatives of their own choosing' was deemed to illegalize the closed shop. * * * [the proviso to Section 8 (3) was designed] to prevent similar misconceptions of this bill." (S. Rep. No. 573, 74th Cong., 1st Sess. p. 11.)

To the same effect, the House Committee said, "All that [the proviso to Section 8 (3)] does is to eliminate the doubts and misconstructions in regard to the effect of section 7 (a) [of the National Industrial Recovery Act] upon closed-shop agreements, and the possible repetition of such doubts and misconstructions under this bill * * *."—(H. Rep. No. 1147, 74th Cong., 1st Sess. p. 19.)

The Senate Committee said that "the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal; it does not interfere with the *status quo* on this debatable subject but leaves the way open to such agreements as might now legally be consummated, with two exceptions * * *" (S. Rep., pp. 11–12). Similarly the House Committee said "the bill does nothing to legalize the closed-shop agreement in the States where it may be illegal; but the committee is confident that it would not be the desire of Congress to enact a general ban upon closed shop agreements in the States where they are legal" (H. Rep., pp. 19–20). Finally, the Senate Committee declared that the "propaganda * * * that this proviso attaches special legal sanctions to the closed shop or seeks to impose it upon all industry * * * is absolutely false * * *. The assertion that the bill favors the closed shop is particularly misleading in view of the fact that the proviso in two respects actually narrows the now existent law regarding closed-shop agreements" (S. Rep., pp. 11–12).

The purpose, therefore, of the proviso to Section 8 (3), in the eyes of Congress, was to permit the making of closed-shop agreements where such agreements are valid under State laws, to the extent that such agreements are consistent with the provisions and policies of the Act. Its purpose, indeed, was to define the narrow limits

within which the exceptional discrimination against employees because of union affiliation inherent in a closed-shop arrangement was to be permitted under the Act.

In the instant case a minority group of employees who exercised their right under the Act to sponsor the Union in the election campaign was discriminated against, and the employees lost their jobs *because* they had exercised that right. In view of the plain intent of the legislators to protect employees' freedom to organize and to eliminate such restraints upon their exercise of that freedom, there is no room for the contention that the proviso countenances such a result. On the contrary, we submit that even if the letter of the proviso appears to be satisfied, a closed-shop agreement still does not grant the employer and the contracting union *carte blanche* to do as they will without regard to the statutory rights of individual or minority groups of employees. In short, a closed-shop agreement under the Act does not constitute a loophole through which the broad purposes and spirit of the Act may be circumvented and defeated.

Since a closed-shop agreement is valid only, among other conditions, if made with a "labor organization [which] is the representative of the employees as provided in section 9 (a)" (Section 8 (3) of the Act), an examination of the function of Section 9 (a) is essential to a proper

consideration of the validity of a closed-shop agreement under the Act.[*] Congress adopted the majority rule principle in Section 9 (a), after grave consideration of the possibilities it afforded for abuse, as the only workable scheme by means of which an employer and his employees could engage in the collective bargaining the Act seeks to encourage. The House Committee (H. Rep., p. 21) stated that "majority rule * * * is the only practical method of achieving the desired ends."[**] At the same time testimony taken by

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[*] It is significant that the bill originally permitted the employer to make a closed shop contract with the "representative of the majority of the employees" but was amended to require the contracting labor organization to be "the representative of the employees as provided in Section 9 (a)." 79 Cong. Rec. 7650.

[**] The Senate Committee pointed out that "the principle of majority rule has been applied successfully by governmental agencies * * *." It noted that "It was promulgated by the National War Labor Board created by President Wilson in the spring of 1918. It has been followed without deviation by the Railway Labor Board, created by the Transportation Act of 1920. Public Resolution No. 44, approved June 1934, contemplated majority rule in that it provided for secret elections. The 1934 amendments to the Railway Labor Act * * * [embodied the principle]" (S. Rep., p. 13). The House Committee made similar reference to these precedents (H. Rep., p. 22). And Dean Lloyd K. Garrison of the Law School of the University of Wisconsin stated before the Senate Committee that "* * * everybody that has had to deal with this problem * * * [has], without exception, applied the majority rule. * * * What other rule could possibly work?" Senate Committee on Education and Labor, 74th Cong., 1st Sess. on S. 1958, Part 2, p. 127.

the Committees of both the Senate and House,[30] the debates on the floors of both Houses,[31] and the Committee reports, reveal that Congress was acquainted with, and intended to avoid, the danger to minority groups of giving legal sanction to a totally unrestrained majority representative. The House Committee (H. Rep., p. 20) stated that, "the underlying purposes of the majority rule principle are simple and just." The Senate Committee declared that the principle "is sanc-

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[30] Numerous witnesses testified as to the danger of the majority rule principle to individual and minority employees, e. g., before the Senate Committee on Education and Labor, U. S. Senate, 73rd Cong., 2d Sess., on S. 2926, Robert L. Hale, Professor of Law at Columbia University, Part 1, p. 57; William E. Taylor, Chairman Legislative Committee, D. C. Branch, National Association for the Advancement of Colored People, Part 3, pp. 997–998; T. Arnold Hill, The National Urban League for Social Service Among Negroes, Part 3; pp. 1020–1022; before the Senate Committee on Education and Labor, 74th Cong., 1st Sess., on S. 1958, James Myers, Industrial Secretary, Federal Council of the Churches of Christ in America, Part 2, p. 224; Walter Gordon Merritt, Part 3, pp. 318–321; James T. Donnelly, Executive Vice-President, Illinois Manufacturers' Association, Part 3, p. 511; A. B. Trembley, Part 3, pp. 548–549; James Emery, general counsel, National Association of Manufacturers, Part 3, p. 855; before the House Committee on Labor, 74th Cong., 1st Sess., on H. R. 6288, Hon. Frances Perkins, Secretary of Labor, pp. 278–279; Dr. E. R. Lederer, pp. 307–308.

[31] The problem of the rights of minorities was raised in the debates, e. g., in the Senate: Senator Wagner: "* * * majority rule recognizes minority rights." 79 Cong. Rec. 7571; Senators Hastings, Walsh and Wagner: 79 Cong. Rec. 7671–7673; in the House: Messrs. Connery, Taylor and Wood, 79 Cong. Rec. 9686–9687.

tioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions" (S. Rep., p. 13). The evidence is plain that what Congress had in mind was to implant in the field of labor relations the same concept of majority rule which permeates the democratic process, including the same obligation on the part of the majority to observe the rights of minorities.[32] The House Committee noted that "Majority rule is at the basis of our democratic institutions" (H. Rep., p. 21).

On the basis of the political analogy alone it seems clear that Congress could not have intended that the designation of the representative selected by the majority of the employees in a proper unit as the "exclusive" representative of "all the employees" in the unit should clothe that representative with a power it might exercise arbitrarily and accountable to no one. More specific evidence of Congress' intention that the Act

[32] Discussing the bill on the floor of the Senate, Senator Wagner, referring to Dean Lloyd K. Garrison said: "He has made it clear that democracy in industry must be based upon the same principles as democracy in government. Majority rule, with all its imperfections, is the best protection of workers' rights, just as it is the surest guaranty of political liberty that mankind has yet discovered" (79 Cong. Rec. 7571). Similarly, Representative Winthrow on the floor of the House said: "The right of self-government through fairly chosen representatives is a right which is inherent to the American people and to our American form of government. This bill does no more than guarantee that right to American labor" (79 Cong. Rec. 9691).

should protect the rights of minority employees from being overridden by an irresponsible majority, however, is available in the reports of the Congressional Committees and the debates on the floors of both Houses.

The Senate Committee declared that "* * * majority rule, it must be noted, does not imply that any employee can be required to join a union, except through the *traditional method* of a closed-shop agreement, made with the assent of the employer. And since in the absence of such an agreement the bill specifically prevents discrimination against anyone either for belonging or for not belonging to a union, the *representatives selected by the majority will be quite powerless to make agreements more favorable to the majority than to the minority*" (S. Rep., p. 13; italics supplied). Similarly the House Committee stated that "Since the agreement will be unable to apply to all, *the minority group and individual workers are given all the advantages of united action* * * * [*and*] *agreements more favorable to the majority than to the minority are impossible* * * *" (H. Rep., p. 21, italics supplied). And the Senate Committee (S. Rep., pp. 13–14), after pointing out that the bill preserved the right of an individual employee or group of employees to present grievances to their employer, said:

> "Another protection for minorities is that the right of a majority group through its

representatives to bargain for all is confined by the bill to cases where the majority is actually organized "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." *An organization which is not constructed to practice genuine collective bargaining cannot be the representative of all employees under this bill.* (Italics supplied.)[33]

This statement indicates that the Senate did not intend that the broad powers of majority rule should be used by a union to exclude from employment persons it claimed to represent. This clearly appears from the previous history of the majority rule principle. The House Report[34] cites with approval the decision of the National Labor Relations Board established under Public Resolution No. 44, 73rd Cong., H. J. Res. 375, in *Matter of Hoade Engineering Corp.*, 1 N. L. R. B. (old) 35, which was the first decision applying the majority rule principle to employees within Federal jurisdiction other than those covered by the Railway Labor Act. The Senate Report,

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[33] It follows that an organization, however constgucted, which *in fact* does not "practice genuine collective bargaining" repudiates its statutory status as "exclusive" representative of employees. Compare the statement of the Board in *Matter of Monsieur Henri Wines, Ltd.*, 44 N. L. R. B. 1310, 1318–1319 (*infra*, p. 68, n. 45).

[34] H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 20–21.

while not citing the *Houde* case, does refer to the fact that the majority rule principle had been applied under Public Resolution No. 44.[25] In the *Houde* decision, the old National Labor Relations Board reviewed the history of majority rule as developed by the First War Labor Board and by the Railway Labor Board and its successors. It then listed certain situations in which it suggested that majority rule might be inapplicable. Thus, in the *Houde* case (at p. 43–44), the old National Labor Relations Board stated:

> In concluding this opinion the Board wishes to indicate the limits beyond which it [majority rule] does not go. * * *
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> * * * * * *
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> Nor does this opinion lay down any rule as to what the employer's duty is where the majority group imposes rules of participation in its membership and government which exclude certain employees whom it purports to represent in collective bargaining, * * * or where the majority group has taken no steps toward collective bargaining or has so abused its privileges that some minority group might justly ask this Board for appropriate relief.
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> Subject to these qualifications, the Board confines itself to holding that when a person, committee or organization has been designated by the majority of employees in

[25] S. Rep. No. 595, 74th Cong., 1st Sess., p. 13.

> a plant or other appropriate unit for collective bargaining, it is the right of the representative so designated to be treated by the employer as the exclusive collective bargaining agency of all employees in the unit, and the employer's duty to make every reasonable effort, when requested, to arrive with this representative at a collective agreement covering terms of employment of all such employees.

A contemporaneous study of collective bargaining made by the Twentieth Century Fund likewise places similar limitations upon the applicability of majority rule.[36] The two limitations relevant to this case which are stated by the Twentieth Century Fund study are:

> 3. It lays down no rule as to an employer's duty where the majority group imposes restrictive rules of participation in its membership and government, excluding certain employees whom it purports to represent for collective bargaining.
>
> * * * * * * *
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> 5. It lays down no rule in cases where the majority group has taken no steps toward collective bargaining or has so abused its privileges that some minority group might justly ask the board for appropriate relief.

Likewise, in testimony before the Senate and House Committees it was indicated that unions

[36] Twentieth Century Fund, Inc., *Labor and Government* (New York, 1935), pp. 245-246.

enjoying the benefits of the Act must have an open membership policy. Thus, Paul Brissenden, Professor Economics at Columbia University, stated:[27]

> * * * the group which gets its policies and terms written into the protocol must be the recognized group, membership in which, of course, should be open and free from inequitable restrictions, as in the case of the trade associations.

The inescapable conclusion, in view of these considerations, is that Congress intended that the majority rule principle embodied in Section 9 (a) should include a "simple and just" (*supra*, p. 49) observance of the rights of minorities in keeping with the deep sense of justice which is fundamental to our democratic way of life and that the same principles, obviously, should be applied with particular care under the proviso of Section 8 (3).

Understanding as to the meaning of the closed-shop.—Presumably Congress meant to protect by the proviso of Section 8 (3) the closed-shop agreement which had been traditionally recognized in "the philosophy of bargaining as worked out in the labor movement in the United States" (*Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, 346). Authorities in the field of labor relations support the view that

[27] Hearings before the Committee on Education and Labor, U. S. Senate, 73rd Cong., 2nd Sess., on S. 2926, Pt. 1, p. 216.

the purpose and function of the closed-shop, historically, has been to expand union membership, not to restrict it. The closed-shop prior to the passage of the Act was not considered a device to enable the contracting union to control employment on the "winner-take-all" basis which petitioner contends should have prevailed in the case at bar. Its purpose, rather, was to bring within the union fold, not merely the employees who had designated the union as their bargaining agent, but all of the employees in the particular shop or unit who were enjoying the fruits of the union's efforts to improve the lot of the workers. The major reasons advanced by responsible union leaders for seeking a "closed" or "union" shop[38] may be characterized as (1) "self-preservation" or "security" (2) "share the cost," (3) "responsibility," and (4) "sentimental" or "social." While they are necessarily inter-related to a de-

[38] Although these two terms are regarded by some authorities as essentially indistinguishable (Toner, *The Closed Shop*, p. 27), some modern union leaders eschew the term "closed shop" because they feel that opponents of the closed-shop principle have succeeded in distorting the term "closed shop" into an epithet by misrepresenting it as the label for a closed shop with a closed union irresponsibly exercising dictatorial powers over membership and job opportunities. In other words, the term "closed shop" has, in the opinion of those labor leaders, been widely construed as synonymous with the *misuse* and *misapplication* of the closed-shop principle. See Golden and Ruttenberg, *The Dynamics of Industrial Democracy*, pp. 191, 214–216; Appendix B, pp. 86, 100, 102–105, *infra*.

gree, the theory underlying these reasons for the closed-shop may be stated succinctly as follows:

(1) The "self-preservation" or "security" reason stems from the union members' fears that the employment of non-union workers will, by diluting the union's strength, weaken its bargaining power, and inevitably bring about a reduction of the improved working standards the union members have struggled to gain. The ultimate fear, of course, is that loss of effectiveness as a bargaining agent may destroy the union itself (Appendix B, pp. 91–102, 106–107, 111, 115–116, *infra*). (2) The "share the cost" reason is based upon the instinctively human feeling on the part of union member workers that "those who reap the benefits should bear the burdens." The improvement in their common status, achieved through the efforts of the union members, accrues to the benefit of all the employees in the shop or unit involved. The union members resent the fact that their often hard-won gains may be enjoyed by non-union "chiselers" who, by refusing to join in the common cause, not only fail to carry their share of the substantial burden involved, financially and in other respects, but stand as a potential threat to the union's bargaining position (Appendix B, pp. 90, 92, 99–102, 114–115, *infra*). (3) The "responsibility" reason is that a closed-shop, by giving the union greater control over the working force, enables the union to carry out with greater effectiveness and responsibility its

obligations as bargaining representative of the employees. The requirement that all employees become members of the union, subject to union discipline, eliminates possible interference with the Union's exercise of its representative function on the part of irresponsible non-member employees; and thus redounds to the welfare of both management and labor (Appendix B, pp. 93, 94, 98, 101, 102, 107–108, 113–114, *infra*). (4) The "sentimental" or "social" reason is that union men prefer, naturally, to work with their own kind, with men who are sympathetic to their views, and resent being required to work alongside of non-union men whose presence they regard as potentially dangerous to their cause (Appendix B, pp. 86–87, 98, 109–112, *infra*).

Implicit in the rationale underlying these basic reasons for which unions seek the closed shop is the principle that its purpose is "to control the non-unionists by bringing them into the fold" (Appendix B, pp. 86–89, 91–93, 98–99, 103–106, 109, 110–111, 116, *infra*), and not the contrary notion that a union holding a closed-shop contract is constituted an irresponsible and absolute dictator over employment in the shop.[*] It would be

[*] For instance the Steel Workers Organizing Committee, which has now become the United Steel Workers of America, C. I. O., invariably seeks to obtain a union-shop agreement with employers but whenever it loses an election it advises its own members to join the victorious union (Golden and Ruttenberg, *The Dynamics of Industrial Democracy*, Appendix B, p. 113, *infra*). And authorities in the labor rela-

anomalous, indeed, if the closed shop, which arose historically as a means of affording protection against employer opposition to those employees who believed in the necessity of organization, should be used, now that employees' right to freedom of organization is protected by Federal law, for the purpose of thwarting their exercise of that right.

Court decisions.—Decisions of this Court and of others support the Board's construction of the proviso to Section 8 (3), and of the Act as a whole, as applied in the case at bar. In *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, 694–695, the Court noted the "illuminating comment" of the Senate Committee (*supra*, p. 46) to the effect that the proviso to Section 8 (3) was designed not "to facilitate closed-shop agreements" but, with certain exceptions, was to maintain "the *status quo* on this debatable subject." The Court has recognized, moreover, that the individual employee "becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement"; that "the very purpose of providing by statute for the col-

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tions find commonly regard the maintenance of a closed shop by a closed union, which arbitrarily refuses membership to eligible applicants, as a misuse of the closed-shop principle. "The result is a thoroughly unwholesome situation—legally, socially, and economically" Toner, *The Closed Shop*, p. 164; A. G. Taylor, *Labor Problems and Labor Law* (New York, 1938), pp. 90–92.

lective agreement" is to enable the employer and his employee to agree to terms "which reflect the strength and bargaining power and *serve the welfare of the group* [and that the] *benefits and advantages* [of such an agreement] *are open to every employee of the represented unit* * * *". (*J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 336, 338, italics supplied). "The statute guarantees *to all employees*," the Court has said, "the right to bargain collectively through their chosen representatives" (*Medo Photo Supply Corp. v. National Labor Relations Board*, 321 U. S. 678, 684, italics supplied). Similarly, the Circuit Court of Appeals for the Eighth Circuit declared that "* * * *a minority have a right to protection* to the end that they, as well as other employees of the unit, may have their full rights under Section 7" (*National Labor Relations Board* v. *Brashear Freight Lines, Inc.*, 119 F. (2d) 379, 381 (C. C. A. 8, italics supplied). To the same effect the Circuit Court of Appeals for the Sixth Circuit has held that an employer may not discriminate against employee members of a minority union in favor of employees who are members of the majority representative. *National Labor Relations Board* v. *Hudson Motor Car Co.*, 128 F. (2d) 528, 532 (C. C. A. 6).

When a related problem arose under the Railway Labor Act (44 Stat. 577, 48 Stat. 1185) in *Brotherhood of Railway and Steamship Clerks*,

et al. v. *United Transport Service Employees of America*, 137 F. (2d) 817 (App. D. C.), reversed on other grounds, 320 U. S. 715,* Chief Justice Groner, in a concurring opinion, eloquently pointed to the injustice of permitting the majority representative to use its "exclusive" status under the statute so as to discriminate against a minority group of employees. In part he said (at 821–822):

> "* * * the Brotherhood, designated by the Board as the bargaining agent of the [Negro] porters, is a white organization which does not permit membership by the colored employees of the railroads. As a result, the effect of the action of the Board is to force this particular group of employees to accept representation by an organization in which it has no right to

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* This Court's reversal of the above decision in 320 U. S. 715, and the holdings in *Switchmen's Union of North America et al.* v. *National Mediation Board*, 320 U. S. 297, 305–307; *General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Missouri-Kansas-Texas Railroad* v. *Missouri-Kansas-Texas Railroad Co.*, 320 U. S. 323, 336; and *General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Southern Pacific Co.* v. *Southern Pacific Co.*, 320 U. S. 338, 342–344; are not contra to the principle expounded by Chief Justice Groner. Those decisions turned upon the point that the Railway Labor Act foreclosed judicial review of the National Mediation Board's decisions upon questions of representation under Section 2, Ninth of the Act, and therefore did not pass upon the merits. There is, of course, no question of the Court's authority to review the action taken by the Board in the instant case (Section 10 (e) of the Act).

membership, nor right to speak or be heard in its own behalf. This obviously is wrong and, if assented to, would create an intolerable situation. * * * that the Brotherhood, in combination with the employer, should force on these men this proscription and at the same time insist that Brotherhood alone is entitled to speak for them in the regulation of their hours of work, rates of pay and the redress of their grievances is so inadmissible, so palpably unjust and so opposed to the primary principles of the Act as to make the Board's decision upholding it wholly untenable and arbitrary. The purpose of the Act, as is apparent on its face, and as has been recognized and confirmed by the Supreme Court and this Court in many decisions, is to insure freedom of choice in the selection of representatives. * * * nothing in the Act nor in its construction by the courts can be found to justify such coercive action as to force upon any class of employees representation through an agency with whom it has no affiliation nor right of association. * * *. To perpetuate it by law would be to impose a tyranny in many respects analogous to "taxation without representation." And if anything is certain, it is that the Congress in passing the Act never for a moment dreamed that it would be construed to diminish the right of any citizen to follow a lawful vocation on the same or equal terms with his neighbor. In this view, to

enforce the Board's decision would be contrary to both the word and spirit of our laws.

These decisions support the proposition that the selection of a bargaining representative by the majority of the employees in an appropriate unit pursuant to Section 9 (a) of the Act grants no privilege to the employer and the bargaining representative to override the basic statutory rights of individual or minority groups of employees. And where, as in the case at bar, a closed-shop contract is involved, it follows that the rights of minorities must be given every possible protection.

Conclusion.—The principles and authorities reviewed above demonstrate the reasonableness of the Board's interpretation of the proviso to Section 8 (3) and of its holding that the proviso did not sanction the conduct of petitioner and the Independent. The stress which Congress (*supra*, pp. 51–54) and the courts (*supra*, pp. 59–63) have laid upon the fact that the Act was designed to extend freedom of organization to *all* employees, the concern of Congress over the rights of minority groups of employees under application of the majority rule principle (*supra*, pp. 47–55), the political analogy (*supra*, pp. 49–50), and the fundamental purposes of the statute (*supra*, pp. 32–40), compel the conclusion that the granting of the extraordinary right of "exclusive" representation under Section 9 (a) was intended to carry

reasonable obligations with it. While it is clear that Congress did not intend to establish the Board as a regulator of unions, it is equally clear that it did not mean to bestow upon employees and their representatives rights without bounds. The natural bounds are the policies of the Act and public policy generally, and the determination of when these bounds are exceeded was left to the Board."[41]

This Court has recognized that the Act does not protect employees in the exercise of "concerted activities" *per se*, but that the protection is conditioned upon an element of responsibility on the part of the employees. Their activities must not be contrary to the policies of the Act or otherwise contrary to public policy."[42] And

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[41] "A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application * * * in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act * * *. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration." *Phelps Dodge Corp'n. v. National Labor Relations Board*, 313 U. S. 177, 194.

[42] See *Matter of American News Company, Inc.*, 55 N. L. R. B. 1302, 1309-1314, where the Board discusses this problem in conjunction with the Court's decisions in *Southern Steamship Co. v. National Labor Relations Board*, 316 U. S. 31, 47; *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 252-261; and *National Labor Relations Board v. Sands Mfg. Co.*, 306 U. S. 332. Cf. *Cameron v. International Alliance, etc.*, 118 N. J. Eq. 41, where the court

the Court has repeatedly noted the importance of the public interest in labor relations questions (*Thornhill* v. *Alabama*, 310 U. S. 88, 103–104; *Carpenters & Joiners Union of America, et al.* v. *Ritter's Cafe, et al.*, 315 U. S. 722, 724–725), and particularly under the Act (*Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 687; *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 337; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 192–194). It has said that the Board is "charged in the public interest" with the duty of giving effect to the policies of the Act. *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 364; *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U. S. 146, 165–166; the *J. I. Case* decision, *supra*, 321 U. S. at p. 337. It goes without saying that effectuation of the statute's policies may require some restriction upon the absolute freedom of action of employees and their representatives.[11]

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condemned a union's practice of unduly favoring senior members over juniors in the matter of employment privileges, as a "perversion, an embezzlement of power" and "opposed to the public interests."

[11] The National War Labor Board has established a "policy of denying maintenance-of-membership [contracts] when the union is undemocratic and irresponsible," and regularly considers "evidence of union responsibility or irresponsibility [and] *evidence of democratic control and procedure within the union or absence of such control and procedure* * * *" in determining whether to grant a union a maintenance-of-membership contract. *In re Humble Oil and Refining Co.*,

The necessity of applying the above-discussed principles to cases arising under the Act is demonstrated by the case at bar. The minority group of employees herein can be denied employment under the closed-shop agreement only in contravention of the principles of the Act and of public policy." If, under Section 9 (a) a representative chosen by the majority of the employees in a bargaining unit is bound "to practice genuine collective bargaining" in order to be the "exclusive representative of all the employees" in the unit

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15 W. L. R. 380, 387, 389-390 (italics supplied); *In re S. A. Woods Machine Co.*, 2 W. L. R. 459, 462; *In re Los Angeles Steel Casting Co.*, 4 W. L. R. 214, 219; *In re Pullman Standard Car Manufacturing Co.*, 10 W. L. R. 400, 403. See *In re Tennessee Coal, Iron and R. R. Co.*, 15 W. L. R. 15, 17–18, where the Regional Board (Region IV) refused to grant a maintenance-of-membership contract because the union's constitution and bylaws contained "no safeguard against the union's expelling a member unfairly and thus bringing about the loss of his job." See the statement of Mr. Harry Shulman, as umpire, in *In re Arbitration between Ford Motor Company and UAW (CIO)*, 14 L. R. R. 219, 220, 224, that "the prerogative of social clubs to be exclusive in the selection of their membership is not transferable to unions of working men" (Appendix C, p. 51, *infra*).

"To carry out the political analogy (*supra*, pp. 49–50): the C. I. O. adherents, having lost the election, were not only disenfranchised, but were, in effect, deported. See Lusky, *Minority Rights and the Public Interest*, 52 Yale Law Jour. 1–41 (Dec., 1942), for a discussion of minority rights as related to the public interest, with reference to the public interest in labor relations matters at p. 19. See also Note, *Effect of a Closed-shop Contract on Employer Practices Otherwise Unfair under the National Labor Relations Act*, 56 Har. Law Rev. 613, 618–619, 623 (Jan., 1943).

(S. Rep., pp. 13–14), it follows that a representative which enjoys the privileges of a closed-shop agreement must do so. Indeed, because of the very nature of a closed-shop agreement with respect to both the power it places at the disposal of the contracting union and the disastrous effect upon individual or minority employees against whom an abuse of such agreements might operate, it would seem that the test of whether a representative is satisfying the requirements of Section 9 (a) should be applied more strictly in the latter case than in the former. While the Board has never invalidated a contract between an employer and a majority representative of his employees in the absence of a finding of unfair labor practices committed by the employer, it nevertheless has indicated an awareness that labor organizations enjoying the privileges of exclusive representation under Section 9 (a) incur complementary obligations and that a failure of the representative to discharge those obligations might result in either the invalidation of its bargaining agreement or in the loss of its status as exclusive representative under the Act.[7] If a bargaining

[7] In *Matter of Bethlehem-Alameda Shipyard, Inc. and Bethlehem Steel Company, Shipbuilding Division, Alameda Yard*, 53 N. L. R. B. 999, 1016, a representation proceeding not involving unfair labor practices, the Board, without deciding the question, declared: "We entertain grave doubt whether a union which discriminatorily denies membership to employees on the basis of race may nevertheless bargain as the exclusive representative in an appropriate unit com-

agreement, otherwise valid, may be abrogated because the contracting union is not deporting itself in accordance with the requirements of the Act, it necessarily follows that where, as here, both the employer and the contracting union fail to observe the statutory requirements in executing a

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posed in part of members of the excluded race. Such bargaining might have consequences at variance with the purposes of the Act. If such a representative should enter into a contract requiring membership in the union as a condition of employment, the contract, if legal, might have the effect of subjecting those in the excluded group, who are properly part of the bargaining unit, to loss of employment solely on the basis of an arbitrary and discriminatory denial to them of the privilege of union membership. In these circumstances, the validity under the proviso of Section 8 (3) of the Act of such a contract would be open to serious question." In another representation proceeding, *Matter of Larus & Brother Company, Inc.*, 5–R–1413, 5–R–1437, the Board, on April 7, 1944, issued a rule to show cause why it should not rescind its certification of a union which allegedly refused to admit to membership and to bargain for Negro employees, who constituted a minority in the bargaining unit composed of both Negro and white employees. The Board has since directed a further hearing in the matter. And in *Matter of Monsieur Henri Wines, Ltd.*, (*supra*, p. 41), the Board, declaring a closed-shop contract invalid, found that the contracting union, by using its contract "as a device to legalize its fraud," had *"repudiated its representative status"* and that the agreement was not "the culmination of bona fide collective bargaining between an employer and a labor organization acting as the exclusive representative of his employees, within the meaning of Section 9 (a) * * *" (44 N. L. R. B. at pp. 1318–1319, italics supplied). In the latter case, as in the instant case, however, the Board found that the employer had committed unfair labor practices. See also *Matter of U. S. Bedding Company*, 52 N. L. R. B. 382, 388.

closed-shop agreement the Board may find the agreement invalid.

B. PETITIONER VIOLATED SECTION 8 (3) OF THE ACT IN EXECUTING THE CLOSED-SHOP AGREEMENT AND IN DISCHARGING EMPLOYEES PURSUANT THERETO

For the reasons set forth above the closed-shop proviso in Section 8 (3) does not protect an agreement designed to discriminate against members of the bargaining unit who are willing to join the majority organization. Accordingly, we submit that the Board properly held that petitioner violated Section 8 (3) of the Act in executing the closed-shop agreement with the knowledge that the Independent intended to use it, contrary to the purposes of the statute, in order to deprive employees of their jobs because of their previous adherence to the Union. It follows, of course, that the discharge of employees pursuant to the terms of the illegal agreement was discriminatory and in violation of Section 8 (3). *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, 694; cf. *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 81.

Petitioner's contention that it was compelled to enter into a closed-shop contract with the Independent by reason of the settlement agreement which provided that petitioner would execute a closed-shop contract with whichever union won the election (*supra*, p. 9) is without merit. The set-

tlement agreement provided for a closed-shop in the customary sense, and not as a means of securing the discharge of members of the minority union. Furthermore, as was pointed out by the Board (R. 22, 23) and by the court below (R. 349–350), regardless of the validity of the settlement agreement, petitioner cannot say that performance of its terms required petitioner to violate the Act.[46] It is thoroughly settled that private parties cannot by contract "make permissible a course of conduct forbidden by law" (*United States* v. *City and County of San Francisco*, 310 U. S. 16, 28), and that even where an agreement is valid when made, an intervening "change of fact or of law" may render further performance illegal.[47]

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[46] *Restatement of the Law of Contracts*, Vol. II, Sec. 608. See also 6 Williston on Contracts (Rev. Ed.) Sec. 1759: "* * * where the contract was originally legal, but because of a change in purpose of the parties, or a change in the law, performance of the acts contracted for on one side or the other has become illegal, any subsequent performance of such acts is against public policy and the party who has undertaken to perform them is excused from so doing * * *."

[47] In *Omnia Co.* v. *United States*, 261 U. S. 502, 512, the Court quoted with approval the following language from *In re Shipton, Anderson & Co.*, (1915) 3 K. B. 676, 683–684: "If one contracts to do what is then illegal, the contract itself is altogether bad. If after the contract has been made it cannot be performed without what is illegal being done, there is no obligation to perform it. In the one case the making of the contract, in the other case the performance of it, is against public policy." In *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 307–308, the Court observed that "Contracts,

Similarly, petitioner's protestations of good faith in executing the closed-shop agreement, even if credited, do not alter the fact that its conduct was illegal. It is settled that an employer's motive and intent are not determinative of the question whether his conduct is in violation of the Act. As the Sixth Circuit has held, "where it is once made to appear from the primary facts that the employer has violated the express provisions of the Act, we may not inquire into his motives," even where it is shown that the employer "has not willfully violated" the Act. *National Labor Relations Board* v. *Hudson Motor Car Company*, 128 F. (2d) 528, 532–533 (C. C. A. 6). To the same effect are: *National Labor Relations Board* v. *Gluek Brewing Co.*, decided August 7, 1944 (C. C. A. 8); *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. (2d) 748, 752 (C. C. A. 7), certiorari denied, 313 U. S. 565;

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however express, cannot fetter the constitutional authority of the Congress. * * * Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them. See *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 357." See also other cases cited at 294 U. S. 306–311. In cases arising under the Act the Court has also had occasion to observe that since the Board is "charged in the public interest with the duty of preventing unfair labor practices" (*National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 364), "wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility." *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 337.

American Smelting & Refining Co. v. *National Labor Relations Board*, 126 F. (2d) 680, 685 (C. C. A. 8); *Kansas City Power & Light Co.* v. *National Labor Relations Board*, 111 F. (2d) 340, 346–347 (C. C. A. 8); *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. (2d) 465, 470 (C. C. A. 9); cf. *Warehousemen's Union* v. *National Labor Relations Board*, 121 F. (2d) 84, 87 (App., D. C.), certiorari denied, 314 U. S. 674; *National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. (2d) 919, 936 (C. C. A. 2).

III

PETITIONER DOMINATED, INTERFERED WITH, AND SUPPORTED THE INDEPENDENT IN VIOLATION OF SECTION 8 (2) AND (1) OF THE ACT

If we are correct in concluding that petitioner had engaged in the unfair labor practices discussed in Point II, *supra*, which occurred subsequent to the settlement agreements and certification, then, as we have shown in Point I, *supra*, pp. 19–31, the Board was clearly justified in considering the entire course of petitioner's conduct, including events prior to the settlement agreements and certification. However, even if the Court should disagree with us as to the substance of Point II, we submit that the Board's order should nevertheless be affirmed in view of its finding that the Independent was dominated, interfered with, and supported in violation of Section 8 (2) and (1). That is, even if, contrary

to our argument under Point II, no independent unfair labor practices had occurred subsequent to the certification, petitioner's and the Independent's conduct with regard to the execution and effectuation of the closed-shop contract was of so questionable a character and struck so basically at the spirit of the Act as to warrant and, indeed, compel the Board, in vindication of the public interest, to examine the true character of the Independent. This, as we have seen (Point I, *supra*, pp. 31–32), was the view of the court below. Consequently, whatever the Court's conclusion as to Point II, we direct attention to the whole course of the relationship between petitioner and the Independent.

The Board's finding that petitioner dominated, interfered with, and supported the Independent in violation of Section 8 (2) and (1) of the Act (R. 24, 27) is, as the court below held (R. 348), supported by substantial evidence (*supra*, pp. 4–9). During the second week of the strike, petitioner launched the Independent to compete with the Union as a candidate for the employees' choice as their bargaining representative. The initial appearance of the Independent was under the sponsorship and guidance of Foreman Clark Gibson who delegated to his assistant, Lundy Groves, and to Groves' wife, the task of setting up the organization (*supra*, p. 6). The assistance rendered by Weese, petitioner's pay-

master and confidential secretary to Plant Manager Davis, in suggesting Thompson as adviser for the Independent (*supra*, pp. 6–7), and the participation in the formation and administration of the Independent of the "assistant foreman," Smith and Reese (*supra*, p. 7), together with the joint sponsorship by petitioner and the Independent of the anti-union back-to-work movement which was conducted coextensively with the Independent's membership drive (*supra*, pp. 8–9), unmistakably placed the print of management approval and support upon the organization. *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 80–81; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 518–521; *National Labor Relations Board* v. *American Mfg. Co.*, 106 F. (2d) 61, 64, 68 (C. C. A. 2), affirmed 309 U. S. 629; *National Labor Relations Board* v. *Norfolk Shipbuilding & Drydock Corp.*, 109 F. (2d) 128, 129 (C. C. A. 4); *New Idea, Inc.* v. *National Labor Relations Board*, 117 F. (2d) 517, 519, 523–525 (C. C. A. 7); *National Labor Relations Board* v. *Germain Seed & Plant Co.*, 134 F. (2d) 94, 96–99 (C. C. A. 9).

The Board's findings that Groves, Smith, Reese, and Mrs. Weese [*] were employees identified with

[*] "The fact that Mrs. Weese, at times, attended foremen's meetings at the plant (R. 188, see also R. 260); that foremen and others occasionally turned to her for advice in the absence of Plant Manager Davis (R. 177–178) and that she

petitioner's management (R. 12, 20) are supported by substantial evidence (*supra*, pp. 6–7), as the court below held (R. 348). While petitioner officially designated Groves and Smith as "machine set-up men" and Reese as an "oiler" (*supra*, p. 7), they were, in fact, temporary or assistant foremen. They were so regarded by other employees,[49] and Plant Manager Davis admitted at the hearing that they might properly be considered temporary foremen (R. 214–216). Their selection by the Company to substitute for their respective foremen during the latter's absences plainly set them apart and clothes them with a prestige which inevitably associated them with the management in the eyes of the other employees.[50] The

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was petitioner's paymaster and the confidential secretary to Plant Manager Davis (*supra*, pp. 6–7), supports the Board's finding (R. 20) that she was "identified with management." *National Labor Relations Board* v. *Germain Seed & Plant Co.*, 134 F. (2d) 94, 96, 98–99 (C. C. A. 9); *National Labor Relations Board* v. *Southern Bell Telephone Co.*, 319 U. S. 50, 54; and cases cited in text, *infra*, p. 76.

[49] Employees who worked under them consistently referred to Groves, Smith, and Reese, as "assistant boss" or "assistant foreman" who, in the absence of the regular foreman, "would give us orders what to do" (R. 87–88, 97, 126–130, 133, 153–154). One employee testified that he had known Groves "to run the department for more than three weeks at a time" when Foreman Gibson was absent (R. 78).

[50] The fact that these temporary foremen were permitted to vote in the Board supervised election (*supra*, pp. 9–10; R. 190–191) did not preclude the Board from finding that their participation in the formation and administration of the Independent was attributable to the Company and therefore constituted unlawful support of, and interference with, the

Board was warranted in so finding (R. 12). *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 80–81; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 518–521; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 598–599; *National Labor Relations Board* v. *Cities Service Oil Co.*, 129 F. (2d) 933, 934–935 (C. C. A. 2); *Gamble-Robinson Co.* v. *National Labor Relations Board*, 129 F. (2d) 588, 590 (C. C. A. 8); and other cases cited, *supra*, p. 75, n. 48.

SINCE PETITIONER DOMINATED, INTERFERED WITH, AND SUPPORTED THE INDEPENDENT IN VIOLATION OF SECTION 8 (2) OF THE ACT, THE CLOSED-SHOP AGREEMENT WAS INVALID

To be valid under the proviso to Section 8 (3) of the Act, a closed-shop agreement must be made with a labor organization which (a) is "not established, maintained, or assisted, by any" unfair labor practices, and (b) "is the representative of

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Independent. The right of foremen and other supervisory employees under the Act to become members of a labor organization does not include the right to coerce subordinate employees, either by soliciting members or by otherwise engaging in active leadership in the organization. *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 80–81; *National Labor Relations Board* v. *Aintree Corp.*, 132 F. (2d) 469, 472 (C. C. A. 7), certiorari denied, 318 U. S. 774; *National Labor Relations Board* v. *Skinner & Kennedy Stationery Co.*, 113 F. (2d) 667, 671 (C. C. A. 8); *National Labor Relations Board* v. *Christian Board of Publication*, 113 F. (2d) 678, 682 (C. C. A. 8); *National Labor Relations Board* v. *Pacific Gas & Electric Co.*, 118 F. (2d) 780, 788 (C. C. A. 9).

the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made."[51] Where either of these requirements is not satisfied, a closed-shop agreement is unlawful. *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, 694; *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 75, 81.

In the instant case the Board found that the closed-shop agreement between petitioner and the Independent failed to meet the requirements of the proviso to Section 8 (3) of the Act in that (a) petitioner had dominated, interfered with, and supported the Independent in violation of Section 8 (2) (R. 24, 27), and (b) petitioner entered into the agreement with the knowledge that the Independent intended to refuse membership to employees for the reason that they had previously engaged in activities in behalf of the Union (R. 21, 23, 24). If the Court affirms, as did the court below (R. 348), the Board's finding that petitioner violated Section 8 (2) of the Act in its relations with the Independent, it is clear on the face of the statute (Section 8 (3)) that the closed-shop agreement was illegal *ab initio* and could not be a valid basis for discharging employees because of their failure to become members

[51] No question as to the appropriateness of the bargaining unit is present in the instant case.

of the Independent, regardless of the reason for their non-membership. *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, 694; *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 75. In these circumstances, the Board could properly require petitioner to cease giving effect to the unlawful closed-shop agreement and to restore to their *status quo* the employees discriminated against by reason of the agreement. The *Electric Vacuum Cleaner* and *International Ass'n of Machinists* cases (*supra*).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below should be affirmed.

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APPENDIX A

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce. * * *

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right to employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment

of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees

the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(e) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony

taken, the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency,

shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any cir-

cuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * *

APPENDIX B

STATEMENTS OF ECONOMISTS AND EXPERTS IN THE FIELD OF LABOR RELATIONS WITH RESPECT TO THE PURPOSE AND FUNCTION OF THE CLOSED SHOP.

[Arranged in Chronological Order]

Moffett, E. H. *The "Open" Shop*, The American Federationist, March, 1904, p. 214:

> The object of the union shop is not to create a monopoly of opportunity. *It is not a "closed shop."* It is wide open to any working man who is willing to help maintain the superior conditions that attract him.

Darrow, Clarence S. *The Open Shop*, Social Economic Series, Vol. 1, No. 2, Hammersmark Publishing Co., Chicago (1904), quoted in Golden, Clinton S., and Ruttenberg, Harold J., *Dynamics of Industrial Democracy*, Harper & Bros. (1942), pp. 201–202:

> The reason why a union workman does not choose to work with a non-union workman is plain and evident and founded in the protection of himself and his fellow craftsmen * * *. Instinctively men love the company of others of their kind * * *. The man who desires the society of his companions must so conduct himself that his associates are content to live with him. If he sees fit voluntarily to so arrange his life that his fellows do not desire his company he must accept the consequences, however, unreasonable society

may by. Whether the boycott is just or unjust, equitable or inequitable, has no bearing on the case. In this world men are not crucified because they are good or bad, but because they are unlike their fellows. Trade unionists for centuries have believed that they are upholding the right of man, the welfare of their class; that without their organization their liberty and independence would be lost; they have come to regard the non-union man as one who not only refuses to stand with them, but who is unloyal to his class, a traitor to his kind. They look on him as a man who seeks to undermine and destroy his fellow workman, and from the nature of things there is a great gulf between them and him. This is not a fact in trade unionism; it is a fact in human nature, and is as deep as the right of self-defense. For in the last analysis, it is self-defense.

The employing class has exactly the same feeling toward one of its members who gives his influence and strength on the side of the union workman, and who refuses to stand with them in their opposition to the demands of labor, that the trade unionist has toward the one he calls a scab. Neither is loyal to his class. Both pay the penalty of their disloyalty to their class; they are cut off from the friendship and association with others of their kind.

Gompers, Samuel. "*The Union Shop is Right*," American Federationist, April 1905, p. 221:

We assert that the union shop does not deny employment to the nonunionist, but we insist that, like all others in society, persons who are desirous of becoming beneficiaries of an agreement should become parties to that agreement and that they should

bear the equal responsibility which such an agreement involves * * *

Stockton, Frank T. *The Closed Shop in American Trade Unions*, Baltimore (1911), pp. 130, 162, 176.

* * * Finally, when enough members have been obtained to promise a successful issue, the union suddenly reveals to the employer the fact that many of his men are unionists and demands that he make the shop a closed one. If he complies, the non-unionists are given the alternative of joining the union or seeking other jobs (p. 130).

* * * * * *

An argument for the closed shop of which much has been made is that it increases trade-union membership. Experience has shown that there are always a large number of workmen "in and out of the union." They are "in the union" when they obtain a job in a closed shop; they are "out of the union" when they work in a shop where a union card is not necessary. It has been said that "the mere closing of one door to the non-unionist is the best argument to him for application."[2] Instances of marvelous growth in membership following the introduction of the card system have also been frequently reported (p. 162).

* * * * * *

In reply the unions have answered that it is not their purpose to establish a labor monopoly through the closed shop, that on the contrary it is the purpose of every union 'to get every man following or engaged at

[2] Bookbinders, Official Proceedings of the Sixth Annual Convention, 1898, p. 21.

a business to affiliate himself.[1] To this end vigorous campaigns for members are conducted among non-unionists, and 'hundreds of missionaries are at work, in and out of season, urging and pleading with them to enter the wide-open doors of the union.'[2] Furthermore, it is said that even if it is true that ninety per cent of the wage earners in America are non-union, the great majority of non-unionists are 'in occupations in which there are no unions at all, or in which the unions are too weak to think of challenging a contest over the employment of workers outside their organizations.'[3]

Here again it seems to the writer that many of the critics of the closed shop have identified it with the closed union. If non-union men have no difficulty in obtaining union membership, it is hard to see how the closed shop can be condemned as a "criminally selfish" device. Only when a union declares that it will not work with non-members and then refuses to admit the latter to membership can monopolistic motives properly be charged.[4] Closed unions, however, are rarely found at present except

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[1] Operative Plasterers' Proceedings of the Eighteenth Convention, 1904, p. 45.

[2] American Federation of Labor, Report of Proceedings of the Twenty-third Convention, 1903, p. 20, President's Report.

[3] Iron Molders' Journal, June 1904, p. 423.

[4] "If a union is working not for the interest of all the men at the trade but of members who at the time are actually in the union, if it is unduly restrictive * * * then its refusal to work with nonunion men is monopolistic and such a union should not be put up on a par with unions that refuse to work with non-unionists in the general interest of the trade." (Mitchell, p. 283.)

in decaying trades. The closed shop is ordinarily intended not to restrict membership but to increase it, as has already been shown* (p. 176).

Carlton Frank T. *The History And Problems of Organized Labor,* Boston (1911), pp. 126–128:

The two arguments in favor of the closed shop are, "sentimental" and economic. According to the first method of justifying the closed shop, wages have been raised and conditions of labor within a given trade improved as the result of the efforts and the sacrifices of the members of labor organizations. All workers in a trade are benefited; and "he who is benefited should bear his share of the expenses of the benefactor." The man who refuses to join the union and bear his share of the expenses necessary to the success of the union's policies is a parasite and deserves to be excluded from employment. Through the efforts of labor organizations unionists expect not only to help themselves, but indirectly to aid all wage earners. Viewed through these spectacles, the non-unionist or "scab" strikes a blow at the hearthstone of every worker in the land when he refuses to conform to the program of the union. At best, the "scab" is an extremely short-sighted man, and one who must not be allowed to ruthlessly take away such advantages as have been gained by labor organizations. The following quotation well illustrates the union point of view. "To the non-unionist, despite that which his advocates say for him, cannot be attributed the virtue of helping his fellow workmen or contributing toward the establishment

* See above, p. 162, *et seq.*

of more rightful relations between workingmen and their employers. No force but that of persuasion and moral and intelligent influences should be exercised to convert the non-unionist to membership in our organization, but it is hurtful from every viewpoint, and to every enlightened interest, to advocate the "open shop."[1]

The economic necessity for the closed shop depends in a large measure upon the attitude of the employer. If the employer insists upon his right to make individual bargains with non-union employees, and discriminates against union men, or hires non-union men at a lower wage than that paid union men, the union will sooner or later be obliged to fight or be disintegrated. The hostile employer, unless restrained by the closed shop or by a uniform system of wage payment for all workers coupled with a system of apprenticeship and of promotion, can deunionize his shop unless the union includes practically all the workers available in that trade or industry. The Union facing a hostile employer anxious to reduce wages and to lengthen the working day, and in touch with a supply of non-union workers, is forced, unless it gives up all hope of efficient trade-union action, to adopt the closed shop policy. Under such conditions the closed shop means more bread and butter, more leisure, and better treatment for the wage-earner.

Bryan, W. E. (General Pres. United Brotherhood of Leather Workers). *"Open" and*

[1] *American Federationist*, November 1903, p. 1196.

"Closed" Shops, American Federationist, April 1912, p. 324:

> The closed or union shop, as advocated by trade unions, is founded on justice and equity to all men. The church is a closed shop inasmuch as it requires its members to subscribe to its precepts and practice its principles. The trade union asks no more than the church in its requirements, and its doors are open to all men that are willing to accept its principles and subscribe to its purpose.

Commons, John R. and Andrews, John B. *Principles of Labor Legislation,* New York (1936), p. 391:

> d. *Closed-shop Strikes.*—A closed shop means that the employer agrees to employ only union members. Unions justify their demand for a closed shop on two grounds: (1) They allege that only workers who support the union financially and otherwise are entitled to the benefits which it secures. (2) They insist that if the shop remains open to non-unionists collective bargaining will be endangered. For the union will be seriously weakened, both because workers will not feel the need of retaining membership, and, perhaps more important, because the employer will be able imperceptibly to discriminate in favor of non-unionists, and thus eventually be able with impunity to break the collective agreement or refuse to renew it. In order, then, to maintain the wages and hours won through union effort, many unions seek to achieve the closed shop.

Gompers, Samuel. *The Union Shop And Its Antithesis* (pamphlet). July 1920. Quoted

in Beman, Lamar, T., *The Closed Shop.* New York, 1922, p. 49:

> A non-union man who accepts employment in a union shop has the privilege of joining the union which has a voice in determining with employers the wages, hours and conditions of work. He is given time in which to make application, if he so desires.

Lord, James (Pres. Mining Dept. A. F. of L.). *The "Open Shop,"* American Federationist, January 1921, pp. 49–50:

> The union shop is the real "open shop." It is open to all workers, in every trade and industry, who desire to join and lend their efforts to an intelligent solution of their affairs. No matter what their past attitude has been, * * * the past is wiped out that minute they exhibit a desire to carry their share of the burden and costs of their own movement, as well as share in its achievements and blessings.

Catlin, Warren B. *The Labor Problem,* New York (1926), p. 344:

> The unions themselves look to complete organization and the maintenance of a union-shop as the best guarantee that prompt readjustment to new conditions will be made, standards preserved, and agreements kept inviolate. They ask for this measure of control in order that they may enforce discipline. Here the issue is clearly joined with that large group of employers * * * who, while professing no desire to discriminate against union men—might, in fact, hire one occasionally if they could not find anyone else—declare for the "open shop" and the right of the employer to hire

whom he pleases, regardless of whether or not he belongs to any union or association. The demand for the union shop—that only members of the union shall be employed or that non-union men who are employed shall be required to join the union within a reasonable time—is chiefly a result of the uncertain, partially recognized, probationary status of the union that still prevails in many industries. * * *

Cummins, E. E. *The Labor Problem in the United States,* New York (1932), p. 231:

To trade unionists the closed shop seems in most instances an obviously necessary device for the protection of their interests through union control of working conditions; that is to say, it is one means and an important one of enforcing the general policy of standardization. * * * The union also insists that the closed shop holds many advantages for the employer: In demanding the "check-off" system, the anthracite section of the United Mine Workers' Union made use of this argument—a fight for the check-off being, of course, practically equivalent to a fight for the closed shop. "Outlaw" strikes occurred in spite of trade agreements, and the union contended that with the check-off it could keep its members under control.

Tead, Ordway and Metcalf, Henry C. *Labor Relations Under The Recovery Act,* New York and London (1933), p. 172:

10. Union demands culminate in a stand for the "closed shop." This restricts the freedom of any worker who does not join and hence is "un-American." It is true that unionism in order to fulfill its purpose—indeed, in order to be sure of its

survival—logically implies that the shop which is operating under a collective agreement shall at least *give preference* in employment to union workers. Otherwise the union members employed would be gradually superseded and the collective agreement would no longer have binding effect on the new workers in their dealings with the company. If the union is to be responsible in any degree for upholding its end of an agreement, *it must have assurances that the great majority of employees are and will continue to be its members.*

Perlman, Selig and Taft, Philip. *History of Labor in the United States, 1896–1932*, New York (1935), vol. IV, p. 9:

10. The new leaders of the American Labor movement were even more conscious of the immigrant problem than the Knights of Labor, which had pioneered the first legislation to restrict free immigration. They had learned that to workers employed in a given industry, a new wave of immigrants, generally of a new nationality, meant a competitive menace to be fought off and to be kept out of the industry. The emphasis on the closed shop had among other objectives that of preventing the employer from preparing for a future showdown with the union by attaching to himself immigrant employees, who, due to the social and cultural gulf between themselves and the unionized American fellow employees, could be influenced to align themselves with the employer. With all that, the leaders of the Federation, many of them former immigrants, knew that once the natural leaders in an immigrant group had been reached by the gospel of unionism, the immigrant, instead of continuing a liability, became an

asset. Whether the immigrant was treated as a potential asset or an immediate danger depended on circumstances and on the idealism of a particular leader."

Daugherty, Carroll R. *Labor Problems in American Industry*, Houghton Mifflin Company (1936), pp. 557, 558:

(3) The *closed union shop with open union* is the "milder" form of the closed union shop. Employers are supposed to hire union men, but if these are not available, non-union workers may be employed with the express provision that they must join the union as soon as they enter the shop. Only union men are on the jobs in the plant, but union membership is easy to get. Unions advocating this plan claim that the organization can best be saved from the undercutting competition of non-unionists by bringing the latter into the fold, since there is no way to drive them out of the industry. This argument seems largely borne out by the experience of the United Mine Workers in the bituminous-coal fields and of the clothing industry in New York City. The closed shop with open union is thus found mainly in highly competitive and seasonally unstable industries. * * * (p. 557).

The bases of collective bargaining, it has been shown, are the curtailment of competition among individual wage-earners and the observance of uniform employment standards without change over a period of time. The realization of this program is plainly dependent upon the ability of a union to control at least a majority of the workers in its craft or industry. If non-unionists are permitted to labor without regulation, they will accept job terms below the minimum standards demanded by the

union. Most employers will hire them instead of union men, so that the latter will fail to get work unless they too accept poorer conditions. All solidarity will thus ebb away and the organization will in the end be broken up. Recognition of the union, the very existence of the union, depends in many cases on shop control as a part of the main aim of job control. This is particularly true under American conditions. Employers in this country often deal with unions, not because they prefer to, but because they are compelled to by force of circumstances. Many of them would be glad to return to conditions of individual bargaining. Certain exceptions exist, as in the cases of individual railroads, but in most industries eternal vigilance is for unions the price of recognition. The competition of different groups of substandard workers, extremely menacing where skill has been broken down by the use of machines, is unusually keen in the United States. The closed union shop is a reaction to all these conditions. In England one seldom hears of it because organized labor is relatively secure; employers there have for a long time accepted unions as spokesmen for their workers, and recognition is not an issue. Immigration is almost non-existent and the introduction of machinery is not considered an excuse for substituting non-unionists for displaced unionists (p. 558).

Clark, Marjorie R. and Simon, S. Fanny. *The Labor Movement in America*, New York (1938), p. 32:

A closed shop agreement is valuable to the unions primarily because it prevents an

employer from weakening and sometimes destroying the union by gradual replacement of union with non-union workers. To an employer the closed shop agreement is often desirable as it places full responsibility for supplying qualified workers upon the union.

National Industrial Conference Board, Inc., Studies in Personnel Policy, No. 12, *The Closed Shop*, New York (1939), p. 7:

> The case for the closed shop from the management angle is best summed up by the president of a company employing nearly 2,000 workers:
> There is little doubt in our minds that a closed shop reduces or eliminates strained relations among groups of employees, intra-plant hatred and strife, which are very detrimental to management and earnings.
>
> * * * * * * *
>
> Centralized responsible leadership in a national and experienced union has resulted in improved discipline, higher efficiency, and spirit of co-operation. The union undoubtedly appreciated receiving the closed shop and has encouraged a spirit of interest in the success of our business. The union is able to insure uninterrupted operations—our contract calls for no strikes—and it can handle men who would otherwise be chronic trouble-makers. Collective bargaining is more orderly since we are dealing with only one group, with which we can deal at arm's length.

Brooks, Robert R. R. *Unions of Their Own Choosing*, New Haven (1939), pp. 185–187:

> The distinction between a closed shop and a *closed union* should be made clear:

A closed-shop agreement simply requires that all workers hired by the employer shall join the union at the time of hiring or within a stated period afterward. It leaves the choice of workers up to the employer. He can hire whomever he pleases and fire whomever he pleases, as far as a closed-shop agreement is concerned. The closed shop does not create a monopoly of the labor supply by the union since the employer can expand or contract his labor force at will. The closed shop is not itself a hardship on the employer, except to the extent that it increases the union's bargaining power. The chief effect of the closed shop is upon the minority of workers who are unwilling to join the union.

When the closed shop is combined with a closed union, however, a tight monopoly is created which may injure the employer, nonunion workers, and consumers. That is, if the union seriously restricts membership, the effect upon costs of production, prices, sales, and employment is indistinguishable from the effect of any other monopoly—a small minority gains at the expense of the great majority.

The demand for the closed shop rests upon two motives: the desire to prevent a minority of nonunion "chiselers" from securing, free of charge, the advantages for which the union members have paid; and a desire to prevent the employer from defeating the union by gradually transforming a nonunion minority into an antiunion majority.

The first motive is understandable enough to anyone who has ever taken part in group activity. The majority, especially if it is a large majority, almost always feels that the minority ought to pay "its share of the

freight." Even individualistic employers sometimes agree with this point of view. (p. 185–186)

* * * * *

More often, however, the employer takes the position that he will close down his plant before he will permit a minority of his men to be coerced by a majority. In these cases, the union frequently persists in its demand because of a strong suspicion that the real intention of the employer is to get rid of the union altogether as soon as possible. At this point the conflict tends to arrange itself around two unreal symbols: the "closed" shop *vs.* the "open" shop.

Neither side means exactly what it says. The union may be content with less than a closed shop if it can be assured of a secure position. In demanding an "open" shop the employer frequently wants so large a proportion of non-union men that the union is powerless as a bargaining agent. This is perfectly apparent when the "open shop" is accompanied by the other antiunion policies of employers who make the greatest stir over the closed-shop issue. The real matter at stake is not the open *vs.* the closed shop, but unionism *vs.* antiunionism. (p. 187).

Cooke, Morris Llewellyn and Murray, Philip: *Organized Labor & Production*, New York (1940), pp. 47–48:

There is therefore a strong motive for union members and leaders to seek a closed shop contract. Under such a contract workers are required to join the union at the time of employment or within a stated period afterward. If employment is slack, this may mean that only workers on the

union's membership and seniority lists will be employed. The traditional reasons for union insistence upon a closed shop contract are, first, to prevent an anti-union employer from whittling away the union's strength by gradually replacing union members with non-union workers and, second; to compel all workers receiving the benefit of union activities to pay their share of the freight. * * * For some time to come, therefore, the closed shop is likely to be insisted upon as an important tool for preserving collective action among organized workers.

There is a third reason, compelling to union and employer alike, for the closed or union ship. Under a "members only" or even "sole bargaining rights" contract the status of the union is insecure. It owes its continued existence to the day-to-day benefits it can confer upon its membership. There is a tendency therefore for the union to take up grievances indiscriminately and make vigorous efforts to win them all, for if it does not do so, it will lose support and membership. The short-sighted employee who has no justifiable complaint but is pressing for "action" will say, "All right, if you won't take up my case, I'll stop paying dues and get my friends to do the same." Under a closed shop contract this is impossible. The union then is in a position to take up cases on their merits alone, ignoring threats of this kind.

Lester, Richard A. *Economics of Labor*, New York (1941), p. 622:

Unionists * * * defend the closed shop on the ground that, if a majority of the employees select a certain agency to repre-

sent them, the rest should accept that majority decision and assist in paying for the benefits they receive as a group through collective bargaining and the activities of the union. This argument rests on the notion that no employee should be permitted to be a "tax dodger." Union officials also insist that 100-percent unionization is necessary if the union is to enforce its working rules, particularly national union rules that may not be embodied in local trade agreements. * * * In addition, union leaders state that they cannot be responsible for the discipline of all workers in a plant unless all of them are in the union and hence are subject to the union's discipline measures.

Labor officials have also insisted that the closed shop is necessary to prevent discrimination in favor of nonunion men, to prevent competition on the terms of employment, and to win strikes.

Daugherty, Carroll R. *Labor Problems in American Industry*, New York (1941), p. 464:

> * * * Union standards and union existence depend on the maintenance of union shops. They are furthermore undoubtedly justified in claiming that it is not fair for non-unionists to work with union men. Why should the former reap where they have not sowed, getting the benefits of union wages and standards without making sacrifices for them?

Toner, Rev. Jerome L., *The Closed Shop*, Washington (1942):

> The origin of the term "closed shop" never has been satisfactorily ascertained. According to Samuel Gompers * * * the

phrase was coined and cunningly employed by opponents of labor as a synonym for the term "union shop" because of wide public antipathy for anything "closed" and general sympathy for the freedom of opportunity popularly, but speciously, associated with the so-called "open shop." (pp. 22–23)

Trade union leaders have with good reason tried to supplant the term "closed shop" with "union shop" * * * (p. 25).

* * * Strictly interpreted, membership as "a condition of employment" might mean that the workers must be members of the union before starting to work, or more strictly still, that the employer must employ only those who are and have been members of the union, in which membership in some cases might be difficult or impossible to acquire. Interpreted liberally, the expression "union membership as a condition of employment" suggests that a "new worker must either be a member when he is hired or become a member within a specified time after commencing work with company."[44] This is the interpretation usually intended in current closed shop agreements. (p. 32–33)

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In some of the better-organized industries, "any applicant must be admitted who is not an offender against the union * * * and if any rule shall be passed that imposes unreasonable hardship, or that operates to bar desirable per-

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[44] National Industrial Conference Board, [*The Closed Shop*], p. 4; cf. National Association of Manufacturers, [*Open Shop Encyclopedia for Debaters* (New York: 1921)], p. 6.

sons, that matter may be brought before the tribunal trade board with appeal to the board of arbitration for such remedy as it may deem advisable."[78] (p. 37)

* * * * *

As for the charge that it is in the nature of the closed shop to create an air-tight labor monopoly, a recognition between the use of the principle and the abuse of related circumstances is important. The situation that produces the closed shop and the closed union in combination is one that no friend of labor will seek to justify. Unless union membership generally is open to every competent worker on terms that are non-discriminatory, reasonable, and uniform, there is little to be said in its favor. It would be mincing words to argue that the closed shop with the closed union does not impede the basic and unchallengeable privilege of the employer to hire whom he pleases and of the individual to

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[78] Amalgamated Clothing Workers of America, standard contract.

[79] The United Mine Workers of America have always permitted the coal operator to employ anyone he wished but they have insisted that anyone not a member of the union should, on employment, join up. (p. 41)

* * * * *

[80] As long as the union honestly and reasonably keeps its membership books open to those qualified and willing to join and retains a moderate initiation fee, that type of closed shop with open union is defendable, but as soon as the closed shop and closed union are united, there is little to be said for them and they are condemned by the courts and union leaders generally. The public and the press, either ignorant or misinformed, are inclined to condemn every type of closed shop agreement. (p. 42–43)

have the opportunity to join the union so that he may work in a closed shop.[110] It cannot be denied that there have been and still are some flagrant and infamous offenses against freedom of opportunity committed by labor czars and racketeers who have corrupted the principle of the closed shop for their own purposes. Their power, however, comes not from the closed shop as such, but from their methods of threat and coercion, graft and violence; their victims are not only employers but workers as well. * * * (p. 136–137)

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A related objection to the closed shop is that it makes employment contingent upon continual good standing in the union. But though that condition springs from the very nature of the closed shop principle, abuses against that principle are not intrinsic to it. Here again it would be a disservice to labor to attempt to excuse or minimize the grave injustice involved in the deprivation of employment caused to any unionist expelled or suspended without sufficient reason. (p. 140)

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Closely connected with the criticism of compulsory union membership is the charge

[110] It must not be inferred that an open union would not have the right to induce an employer to give preference to union men in hiring or that he should not agree to hire only those who are already or will become members of the union. In effect, in a period of considerable unemployment, that would be tantamount to a closed shop union, but with one significant difference—the union would have been open for workers who wish to insure their job opportunities and the employer would have waived his right to employ whom he pleases.

that "force and coercion are absolutely essential to the establishment and maintenance of the closed shop and will always be its most prominent characteristic so long as it continues to be an industrial institution." [120] As already pointed out, such an indictment may be valid when the closed shop is coupled with a closed union. When these two practices exist in combination, there is the danger that an artificial monopoly may be created. But when the closed shop operates under an open union, nonunionists will not be shut out if they are willing to join the union. The degree of force and coercion necessary to establish and maintain that type of closed shop—as a general rule the only defensible type—is automatically lessened (pp. 140–141).

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The fact is that closed shop unions are generally open to any qualified worker—as stipulated by collective agreements and by statutes. (p. 146)

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Whenever unionists are in the majority, they have the right to bargain as the exclusive agent for a contract which benefits unionist and non-unionist alike. It is generally under such conditions that a union tries to obtain the closed shop. (p. 149)

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To begin with what is probably its best-known function, the closed shop offers protection to union members. * * * a closed shop assures the union and its mem-

[120] Walter Drew, "Closed Shop Unionism," in L. T. Beman (editor) *Selected Articles on the Closed Shop* (New York 1921), p. 150.

bers of non-discrimination during the life of the agreement, for once the closed-shop contract is obtained the employer cannot hire any non-union worker except for a specified period of time. Thus the union membership will remain numerically the same even if the employer should be vindictive enough to discharge those who had been very active in promoting the cause of unionism. When he finds it necessary to maintain or increase his working force, he will be obliged to hire men who are or will become members of the union * * * the union * * * finally resorts to the seemingly drastic measure of the closed shop because it realizes, as Sidney Hillman says, that "a labor organization can be constructive and responsible only where it is strong, independent, and well-disciplined."[10] Under closed shop conditions, a union is afforded the greatest possible opportunity for developing those attributes.

Even in cases where the employer is willing to sign a non-closed shop contract, the union is forced to harbor a natural suspicion that the arrangement will not last; the apprehension that the added pressures of contractual obligations may induce the employer to hire non-union men forces the union to seek the closed shop as a means of self-preservation. (p. 149–151)

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Closely related to this aspect of the closed shop is its function in contributing to an increase in responsibility. Since under collective bargaining the wages,

[10] Hearings before the Committee on Education and Labor on *S. 1000, S. 1264, S. 1550, S. 1580, and S. 2123*, 76th Cong., 1st Sess. (1939). p. 3769.

hours, and conditions of work are negotiated and agreed upon by the employer and the union, and since the enforcement of agreements is generally left to the union, it is essential that the union have authority over all the employees to whom the contract applies. The unions contend that the degree of responsibility will be in direct proportion to its control over all employees. Therefore, in view of the nature of the relationship of the closed shop to all employees covered by the contract, the union regards it as the best method by which to carry out its obligations in the fullest measure * * * (p. 157). * * * Defenders of the closed shop point to the fact that the strongest and most responsible unions in the United States are those that have closed shop contracts or conditions that endow them with similar authority. (p. 157)

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An important aspect of the power of the closed shop to control job opportunity and tenure is the dangerous power which it vests in union leaders who do not represent the interests of the rank-and-file membership. The almost irresistible impulse to perpetuate their positions sometimes leads them to utilize constitutional devices to centralize authority in executive hands.[31] Any attempt to organize an opposition may be penalized by charges resulting in suspension or expulsion from the union, which automatically means dismissal from a closed shop job. Such strategy is carried on by a perversion of parliamentary procedure just as effective as gangster dom-

[31] Harris, [*American Labor*], p. 165; Sullivan, [*This Labor Union Racket*], p. 54.

> ination. Unless the worker is protected from this kind of abuse under the closed shop, it may prove more harmful than employer exploitation and discrimination. Not until the employee who is suspended or expelled from a union is able to go to a Labor board, Federal or State, and have his case heard will this danger, almost inherent, although infrequent, in the closed shop, be removed. (p. 166)
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> * * * the advocates of the closed shop reject the charge of monopoly.[1] They insist that because the union is open to any competent worker no one can complain of being deprived of the opportunity to work * * * *The objective of the union is,* however, to enforce closed-shop contracts, to obtain control of all possible job opportunities, and *to enroll every worker within the ranks of their respective unions* (p. 175). [Italics supplied.]

Golden, Clinton S., and Ruttenberg, Harold J. *The Dynamics of Industrial Democracy,* Harper & Brothers (1942):

> The union-shop idea is simply that union and nonunion workers in most instances cannot work alongside of each other indefinitely for practical reasons. The "yellow-dog contract," now illegal, provided that, because (1) management did not recognize labor unions, or (2) believe in or practice collective bargaining, and (3) its employees

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[1] Since the passage of the National Labor Relations Act and the outstanding decision of *Williams* v. *Quill*, 277 N. Y. 1, 12 NE (2) 547 (1939), the monopoly charge against the closed shop has lost much legal support.

were not union members, it was a condition of employment that no employee could belong to a union. Management, then, used its arbitrary powers of discharge to enforce these contracts, whether they were written or just understood, that any employee who joined the union would be fired when it was learned he had joined, or it was suspected he had joined or might join. Management's enforcement of the dictum that union and nonunion workers should not work side by side was complete. The "blacklist" was devised, this simply provided that once a worker was fired for union membership, union agitation, or suspected union membership no firm in the district, frequently in the industry, would give him employment. This policy naturally flowed from the basic opposition of management to organized labor, but it was also conceived and practiced for practical operating requirements. Associate OPM Director Sidney Hillman aptly pointed this out to the House Judiciary Committee of Congress early in 1941: A Congressman asked, "Now, my understanding of an open shop is a place where union and nonunion men work together. Is that true?"

"Oh, no, Congressman," Mr. Hillman replied, "they just work in the same place. They don't work together."[1]

Members of labor organizations favor the union shop for different but nonetheless potent practical reasons; they cannot afford to work with nonunion workers for reasons of self-preservation. Unionists do so only temporarily as a matter of expedience—until the first opportune time to bring the

[1] Pittsburgh Press, February 28, 1941, p. 2.

non-members into the union fold or replace them with union members. (pp. 200–201)

* * * * * *

The self-defense policy of union workers is, "If we don't hang together, we will each hang separately." As management finds it essential to self-defense to "coerce" those who may stray from an antiunion-shop policy, so, likewise, do union workers find it essential to self-defense to "coerce" nonunion workers into the union fold. In arguing the union shop with a management official who is prominent in high society circles in Pittsburgh, one of the authors remarked, "Whether or not you grant the union shop, union members will continue to exert social pressure on nonmembers to get them into the union." He laughed; the idea that workers might exert social pressure against members of their group who failed to conform to the group's attitudes seemed ridiculous to him. In his own group, of course, social pressures are rigidly exerted—a daughter who married the chauffeur just has to move across the railroad tracks with him. That a non-union worker might have to drink his beer at home instead of at a bar frequented by union workers, to this man of high society, was laughable. Maybe he thought workers exert social pressure only with their fists as he was laughing at the idea of calling a street brawl "social pressure." More likely, however, he felt social pressures were subtle practices that his group in society engaged in exclusively, when actually, of course, they are a vital part of the habits of every social group.

But there is a significant difference in the way in which management and union

members exercise their respective policies of self-defense. A small minority of industrial leaders—only a very small percentage of the manufacturing establishments in America, for instance, belong to the National Association of Manufacturers—formulate the basic policies affecting union-management relations, and "coerce" the vast majority of industrial firms to abide by them. Union members, on the other hand, exercise their self-defense policies within the framework of democratic principles. They do not seek to "coerce" with the penalty of discharge any worker into union membership in a given bargaining unit until a majority of eligible workers have voluntarily become union members. Then a majority—in accordance with the democratic principle of majority rule—seek the right through the union shop to "coerce" a minority of their fellow workers into union membership at the penalty of discharge.

The philosophy of the union shop, therefore, is rooted in the basic democratic principle that governs our political life; namely, the rule of the majority. The only thing that is revolutionary—to management—about the underlying principle of the union shop is that it should be fully accepted in our industrial and economic life as well as our political life (pp. 203–205).

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It is practical for only one union to represent any given group of workers. The minority nonmembers cannot express their views or exert their influence through another union, because neither the law nor management recognizes a minority union.

All workers in a given unit have to be represented by one bargaining agency. Thus the only way the minority workers can express their views and exert their influence is through union membership. They are bound by the action of the majority in any event, and to have a voice in making the decisions of the majority the minority or nonunion workers have to join the union. In cases where SWOC local unions lose an election conducted by the National Labor Relations Board, we usually advise our members to join the victorious union to protect their interests. This does not necessarily deny them their particular views which led them originally to choose SWOC in preference to the victorious union. Within its councils they can express their views and, as frequently happens, after an interval of time they persuade a majority of their fellow unionists to change their local union affiliation to SWOC. But to secure a voice in industry the minority must join the majority union. Membership in the union as a condition of employment, therefore, is an essential requirement of industrial democracy in order to assure all workers a voice in the determination of their conditions of employment.

Police powers or disciplinary powers are vested in the union in direct proportion with the amount of responsibilities it assumes. The union assumes the responsibility to see that no stoppages of work occur, that all workers adhere to the contract machinery to settle grievances peacefully, and that wages and other vital cost factors are pegged generally for the life of the contract. To fulfill these responsibilities the union must have sufficient authority to discipline

those workers who, for example, may stop work in violation of the contract. Because supreme power is divided between management and the union, the majority-rule principle operates differently from the way it does in a political democracy—where supreme power is vested in one agency, the government. Here, if the Republicans are elected, Democrats do not have to join the Republican party, because the state or government has the supreme power to enforce the laws passed by the Republicans. But it is necessary for the minority nonmembers to join the union or else the majority, through the union, lacks the power to see that the minority abides by the rules. For example, nine hundred of a thousand workers vote for SWOC. The one hundred that vote against it refuse to join. If they stop work the entire one thousand workers are affected. Management holds the union responsible for enforcing the contract; but it cannot discipline nonmembers, since its authority is confined to members. Thus in order to discharge its responsibilities for the maintenance of industrial peace the minority workers must be required to join the union at the penalty of discharge.

Lastly, it is a basic principle of industrial democracy that those who share its benefits must assume the responsibility of securing them. This principle has its counterpart in a political democracy; namely, those who enjoy its freedom must assume the responsibilities of it. The city taxpayer, for instance, who votes against the victorious candidate for mayor, whose program advocates increased taxes to build a new city hospital, must pay the additional taxes to erect the hospital. Failure on his part to pay such

taxes, if persisted in, results in the recalcitrant taxpayer losing his property. All the employees in a given bargaining unit, as we have seen, are bound by the collective bargaining contract. The wage increases, shorter hours, and other benefits secured by the majority in the contract are enjoyed likewise by the minority. The union has to pay hall rent, postage, grievance committeemen for lost time, and other operating expenses. To meet these obligations every member must pay the taxes (union dues) levied by and for the support of the union. All the workers in a given unit derive equal benefits from the union and, therefore, they should all share equally in paying the cost of its upkeep. This is possible only through union membership, because the union cannot collect dues from workers for whom it bargains but who, in turn, are not members of it. Union members also, on occasion, have to strike to win gains. This often means that the union has to assess its members to win the strike. The benefits of the victory are shared in equally by the minority nonmembers. Consequently, it is a requirement of industrial democracy that all of its beneficiaries assume their share of the burdens (pp. 211–213).

* * * * * *

We cannot afford to trust implicitly a management that adamantly refuses to concede the union shop after our local union (or unions) in its plant (or plants) has enrolled a majority of eligible workers on a voluntary basis. Nor can other labor leaders, except at the peril of their union's life. A management that withholds from the union full and complete recognition puts the latter

on the defensive, compels it constantly to be prepared for an eventual strike for its very existence (p. 227).

Padway, Joseph A., "The Closed Shop Is Upheld." *The American Federationist* (December 1943), vol. 50, no. 12, pp. 12–13:

> It is ridiculous to say that anyone is deprived of his right to work by the union shop. When simply by joining with his fellow workers in assuming the responsibilities of collective bargaining instead of seeking a free ride, he can obtain the desired employment.

APPENDIX C

Mr. Harry Shulman, as umpire under a contract between the Ford Motor Company and the United Automobile, Aircraft & Agricultural Implement Workers of America (CIO), has recently observed (In re *Arbitration between Ford Motor Company and U. A. W.* (CIO), case No. 209, decided March 29, 1944, 14 L. R. R. 219, 220–221):

> The relationship of a union member to his union is a matter of extreme importance in our economic organization. A union is not a social club or college fraternity where men seek congenial company for leisure time. It is an organization which transcends differences in religious faith, political affiliation, racial origin, educational background, or social manners. More and more, union membership has become a condition of earning a livelihood. Many workers would find it impossible to obtain employment and to provide food and shelter for themselves and their families if they did not belong to a union. The prerogative of social clubs to be exclusive in the selection of their membership is not transferable to unions of working men. The growth of industrial unions like the UAW (CIO) illustrates the emphasis on general inclusion. * * *
>
> The primary and historic purpose of labor unions is, of course, to increase the workers' bargaining power and to protect them in their relations with their employers. But since unions, too, are managed

by fallible and mortal human beings, there is need, at the same time, to safeguard the workers' interests in his relation to the union. This is increasingly true as unions grow in power and importance. The discharge of a worker by an employer leaves him free to take a job with some other employer. But the expulsion of a worker from membership in a union may disable him from finding any work in the community or industry.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

THE WALLACE CORPORATION,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.

No. 66.

PETITION FOR REHEARING.

R. WALSTON CHUBB,
Counsel for Petitioner.

LEWIS, RICE, TUCKER, ALLEN & CHUBB,
Of Counsel.

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THE WALLACE CORPORATION, Petitioner,
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No. 66.

PETITION FOR REHEARING.

To the Honorable the Justices of the Supreme Court of the United States:

Comes now The Wallace Corporation, petitioner in the above-entitled cause, and presents this its petition for a rehearing of said cause and in support thereof respectfully shows:

I. The Court in its majority opinion has dismissed as a procedural technicality the petitioner's principal defense, namely, the valid and binding settlement contract signed by the parties in settlement of the strike, which

settlement was approved by the Board with full knowledge of the circumstances and was thereafter fully executed by the parties. This settlement required the company to make the closed shop contract for which it is now penalized.

II. The Court omits mention of and, as it may be assumed, has overlooked the controlling circumstance that the Board had full knowledge of all the material facts affecting the strike settlement, having made a statutory investigation of the same charges now advanced to invalidate this settlement. The petitioner was entirely justified in relying upon a settlement so openly approved.

III. The court has approved administrative repudiation of a settlement contract without precedent therefor, either in the policy of the Board, or the decisions of the courts.

First, the authorities which the court cites do not support repudiation of contracts. Second, the Court has discarded without due consideration the fair, practical and well recognized doctrines of estoppel, and has erroneously characterized these doctrines as technical judicial concepts affecting administrative procedure only, and irrelevant to this case.

IV. Through no fault of petitioner, and upon technical grounds, the court has denied argument on the facts with respect to the propriety of the heavy penalties imposed in this case.

V. The majority opinion contains findings of fact which enlarge upon the findings of the Board and are not supported by the record.

Petitioner submits herewith suggestions in support of this petition, setting forth citations of the record and of the authorities in elaboration of the foregoing.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgment of the Circuit Court of Appeals for the Fourth Circuit be, upon further consideration, reversed.

Respectfully submitted,

R. WALSTON CHUBB,
Counsel for Petitioner.

LEWIS, RICE, TUCKER, ALLEN & CHUBB,
Of Counsel.

Certificate of Counsel.

R. Walston Chubb, counsel for the above-named petitioner, hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay.

January 8, 1945.

R. Walston Chubb,
Counsel for The Wallace Corporation.

SUGGESTIONS IN SUPPORT OF PETITION FOR REHEARING.

In support of the motion for rehearing above set forth, petitioner respectfully submits the following suggestions:

I.

The Court in its majority opinion has dismissed as a procedural technicality the petitioner's principal defense, namely, the valid and binding settlement contract signed by the parties in settlement of the strike, which settlement was approved by the Board with full knowledge of the circumstances and was thereafter fully executed by the parties. This settlement required the Company to make the closed shop contract for which it is now penalized.

The court briefly discusses this defense as a procedural matter, as though it were asserted only as an objection to evidence. On the contrary, this was the defense upon which the petitioner relied throughout, both in its answer (R. 43-47) and motion to dismiss (R. 47-52) and in the trial of the case. Petitioner entered into the settlement and performed it on the assumption that the CIO voluntarily waived any claim of domination, that the Board (which had previously investigated the question as hereinafter more fully set forth) had approved withdrawal of the charges, and, in brief, that the issue was dead by unanimous agreement. Petitioner had never formally recognized the Independent and assumed that it was now recognized by the Board and placed on the ballot, for the very proper purpose, unanimously shared, of ending the CIO strike and getting the people back to work.

The court has thus overlooked the contractual nature of the settlement. The settlement was a contract of the parties, not an administrative act of the Board. It is common enough procedure for the Board to dismiss charges

upon a stipulation of the employer with the Board that he will no longer offend. (See Point III, infra.) Such an agreement is not contractual and is naturally good only during good behavior. On the other hand, a formal settlement contract between two contending unions and an employer settling a strike and calling for an election and arbitration of other matters in dispute, is quite a different matter. It is intended to bind the parties. They expect to change position on the faith of it; and they did in this case. An executed arbitration fully performed cannot be repudiated by the loser. Ordinarily and upon familiar principles, unless fraud is found (absent in this case), or unless the settlement is contrary to public policy (which is not here contended), such settlements cannot be invalidated by administrative fiat or even by the courts. The settlement in the instant case was certainly sufficiently formal. It was final, and not contingent, upon approval of the Board; the Board's approval was only necessary because it was named as arbitrator and had to conduct the election.

Note how the parties changed position and accepted the benefits of this agreement: The company resumed production and all the workers resumed employment; the company reluctantly granted a union shop and both unions accepted this benefit; the CIO, at long last, agreed to a Board election, as the company had originally suggested. The CIO agreed that the Independent might go on the ballot as it had itself proposed in its telegram of December 30th. The company changed its position by agreeing that the Regional Director might arbitrate the Dodrill complaint and that complaint was arbitrated by the Regional Director and the company put Dodrill back to work (R. 10, footnote 11). Dodrill, on his part, accepted the benefits. The company and the workmen got most of the benefit by the restoration of industrial peace and the ending of strife. That was the manifest purpose of the

settlement and there is no suggestion anywhere that the settlement was considered a defeat for the CIO or designed as such.

Thereafter the Board held the election and the Independent union was certified. **All parties accepted this decision without objection.** The closed shop contract was made with the Independent and posted at the plant, also without objection. It is the harsh enforcement of this closed shop contract by the Independent which has induced this court to set aside the entire settlement as a technicality, and to penalize the company for alleged bad faith.

It seems to the petitioner that the court has neglected to recognize the obligations of the petitioner under the settlement; but even more woefully neglected to recognize the bad faith on the part of the CIO and the irresponsibility of the Board in repudiating the bargain, and reversing the representations upon which the petitioner had properly relied.

Representations by Conduct. Did not the parties to this settlement agreement all act upon the assumption, and represent by their conduct, that the Independent was eligible for a closed shop contract and that such a contract was legal on the part of the employer? It may be said that the CIO union should not be held responsible for such representations by conduct, being a sort of ward of the court, or of the Board, not sui juris, and not to be held to the ordinary principles of fair dealing. While not subscribing to such paternalistic attitude, we point out in reply that the Board itself was called in and, acting in its official capacity, after investigation of charges, approved the agreement. The Board, before agreeing to act as arbitrator and election official, required withdrawal of the charges of company interference and domination. The Board then arbitrated the Dodrill complaint pursuant to the settlement; caused mutual stipulations to be entered

into, binding the parties to good behavior; held the election, and certified the Independent. Did not the Board thereby approve the assumption of the CIO, and did it not by its conduct also represent that the Independent was eligible for a closed shop contract? Was there any doubt that the certification by the Board was designed to, and did, lead the employer to bargain with the Independent and make the closed shop contract which the Board now claims is an unfair practice?

We earnestly submit that the settlement was a valid contract, and further, that the parties did by their conduct represent that the Independent and the company had legal capacity to perform it.

On what ground is this agreement, thus honestly arrived at, invalidated and set aside? After the unions have accepted the benefits of the contract and the company has changed its position, the Board says the agreement can not be carried out because, upon a second investigation of matters antedating the settlement, it appears that the Independent was assisted by the company, making it ineligible for a closed shop contract and making a closed shop contract unlawful, per statute. This is a reversal of position. This Board and the CIO now repudiate the representations which they made when the settlement was signed and which induced the Company to act. And it is the Company which must pay for the Board's mistake, if mistake it was.

In the Vernacular. Since the court has suggested that the defense of the employer is somehow technical or involved in "judicial concepts" not readily acceptable in practical affairs, the petitioner may be pardoned for placing its contentions in the vernacular. Speaking in the language of the street, it appears to the petitioner that the CIO "**welched**" on its contract after it lost. Granting humane motives to the Board, it seems to the petitioner that the action of the Board in sponsoring such repudia-

tion and in penalizing this employer for doing what the Board virtually ordered the employer to do, would be recognized on the street as the "**double cross.**"

These expressions are not elegant, but may perhaps help to illustrate the elemental character of the petitioner's grievance.

II.

The Court omits mention of, and, as it may be assumed, has overlooked, the controlling circumstance that the Board had full knowledge of all the material facts affecting the strike settlement, having made a statutory investigation of the same charges now advanced to invalidate this settlement.

The court does not mention in its opinion, and we think it fair to assume that the court has overlooked, the fact that the Board, prior to the settlement, had investigated the previous charges of company domination (Bd.'s Ex. 5; R. 312) and that the record shows that the Board knew all of the salient facts later developed (Pet. Ex. 17; R. 293, R. 272). This was an official investigation of pending charges (R. 312) authorized by Section 10 (b) of the Act. The court also fails to mention that, if there was any concealment of fact, the record shows that the Board investigator concealed facts from the responsible officials of the company. He said he wouldn't "put his cards on the table" (R. 294). The court has further overlooked the fact that the evidence, at the hearing, of assistance or domination of the company union came from officials of the CIO union. Witness Doddrill and witness Griffie were both officials of the Local (R. 75, 147). They must be held to have known the facts as well as or better than the employer. Would it not be fair for the court to acknowledge these admitted facts before it condemns the employer for relying upon the settlement? Is it not better to acknowledge and correct administrative error, than to permit injustices to

accumulate, to the discredit and perhaps destruction of the whole administrative process?

We ask that the court not overlook salient facts such as the full investigation and knowledge of the Board as to conduct prior to the settlement. We ask the court, if it proposes to authorize the Board to sponsor repudiation of settlements of this kind, that the full circumstances be acknowledged and published. This petitioner has no further recourse for what it deems to be an injustice.

The petitioner asks the court to reconsider. It believes that the correct solution is a proper judicial control of the administrative processes, not legislative abolition, arising from resentment at such excesses.

III.

The Court has approved administrative repudiation of a settlement contract without precedent therefor, either in the policy of the Board or the decisions of the courts.

First, the authorities which the Court cites do not support repudiation of the settlement. Second, the Court has discarded without due consideration the fair, practical and well recognized doctrines of estoppel, and has erroneously characterized these doctrines as technical judicial concepts affecting administrative procedure only, and irrelevant to this case.

No Precedents for Repudiation. The majority opinion supports its conclusion by citing the decisions of the Board and of the courts to show that the Board has consistently gone behind settlement agreements. Petitioner submits that the Court has misinterpreted the authorities. The Board's cases do **not** show that the Board has gone behind agreements of this type. The court decisions cited do **not** show that the courts have approved nullification of strike settlements made by the parties and fairly entered into.

In **Harry A. Halff**, 16 NLRB 667, there was no agreement between the parties but only an executory stipulation for good conduct between the Regional Director and the company and this stipulation was held no bar where it had been violated by the employer. There was no strike settlement, or election, or certification in this case.

In **Chicago Casket Co.**, 21 NLRB 235, there was an executory strike settlement and the employer agreed with the Board to take back all the strikers as conditions permitted. The Board found that the employer had not performed this settlement and held therefore that it was no bar to further prosecution of unfair practices.

NLRB v. Phillips Oil & Gas Co. (C. C. A. 3rd, 1944), 141 Fed. (2d) 304, involved a consent election and withdrawal of charges with the Board's approval and the claim was that the Board was estopped to prosecute for later unfair practices. There was no contract between the parties. The court did not consider the validity of any settlement contract.

Canyon Corp. v. NLRB, 128 Fed. (2d) 953 (CCA 8th, 1942). This was a case where the employer had made an agreement with the Board alone, recognizing a union and agreeing not to further interfere. The court held that an executory agreement of this kind "which has not been observed, does not preclude consideration by the Board of the employer's conduct preceding the agreement." There was no agreement between the parties in this case, and no change of position.

In **NLRB v. Hawk & Buck Co., Inc.** (CCA 5th, 1941), 120 Fed. (2d) 903, there was a Board proceeding which resulted in a consent order and the respondent published this as a notice, by agreement with the Board and the union. The plea was that the said prior proceedings and consent order was a bar to later complaint. The court

held the real question was whether the obligations of the agreement had been complied with and the unfair practices discontinued. There was no strike and no settlement contract. No representations were made or relied upon.

Sperry Gyroscope Co. v. NLRB (CCA 2nd), 129 Fed. (2d) 922. This again was a stipulation with the Board alone, by which the company admitted domination, withdrew recognition, and posted notices. The court held there had been a clear breach of this stipulation. There was no agreement of the parties in this case.

Matter of Locomotive Finished Materials Co., 52 NLRB 922, does not involve the repudiation of any contract of settlement because there was no such contract. Insofar as its considers the doctrine of estoppel it favors the petitioner's contentions in the present case. It appeared that an affiliated machinists union agreed to an election, without knowledge of the revival of an old independent "Association," which was thereafter placed on the ballot and won the election. There were no charges pending at the time the Board made an investigation of the status of the Association and the Board held therefore that the investigation was not notice to the Board as it was not authorized under Section 10 (b) of the Act (which requires charges to be pending to authorize investigations). Objections were promptly filed by the Machinists to the results of the election and the election was set aside. Lastly, there was clear violation of the Act by the employer. In rejecting the suggestion that an estoppel arose, the Board emphasized (1) **the absence of charges pending**; (2) called attention to the fact that there was **no change of position** by the company in reliance on the election; (3) that the **Board had no knowledge** of the real situation; and (4) the parties had never intended to dispose of the charges, which were filed after the election.

The case by inference supports the petitioner's claim when the board says: "No factual inference as to the validity of the Association can be drawn from the Machinists' conduct in this case **as might have been done had the Machinists silently permitted the Association to obtain certification and recognition by the respondent.**" (Emphasis ours.) There can be no doubt that the situation presented in the instant case is stronger due to the authorized investigation, the settlement contract, and the suggestion of the CIO itself that the "company union" be placed on the ballot, and finally the election and certification, when the CIO stood "silently by," without objection.

The doctrine of estoppel While it is admitted that the point was not exhaustively briefed by the petitioner, it is submitted that the court has nevertheless too lightly discarded the underlying principles of estoppel. These principles are firmly established as principles of substantive law by the decisions of this court. They have been characterized as "practical, fair and necessary." The writers consider these principles as "required by good morals" and essential to the administration of justice. A few of these holdings are cited below.

The plea of the petitioner was not a "technical" reliance upon estoppel. The petitioner called attention to the unfairness of the present reversal of the Board's position and claimed that such reversal was so clearly arbitrary as to constitute an abuse of administrative discretion. There can be no question that in a contract between parties sui juris, those parties should be estopped under the circumstances of this case. In this case the Board has sponsored the complaint of a union, throwing estoppel of the union to the winds.

It may be in the public interest to encourage freedom of association and collective bargaining, but it can hardly be in the public interest to encourage unions to repudiate contracts, especially settlements of industrial strife.

As to the Board itself, our complaint is simple. The Board approved a settlement and virtually ordered petitioner to make a closed shop contract. It is unfair to penalize the Company, when the Board changes its mind, and, reversing itself, holds the order of no effect.

The salutary character of the doctrine of estoppel is indicated in the following citations of authority:

> "The principle which underlies equitable estoppel in its proper sense runs through all the transactions and contracts of civilized life." 19 Amer. Jur., Estoppel, section 33.

Or again:

> "And in modern times the wisdom and justice of the principles of estoppel, especially estoppel in pais, are very generally recognized. * * * The modern view being founded upon principles of equity, morality and justice and in accord with good conscience, honesty and reason; and as such, the doctrine of estoppel subserves, if is true, the purpose as a plain, practical, fair and necessary rule of law." 21 C. J. 1063, Estoppel, Section 19 (C).

The doctrine has been approved by this court, being simply stated in **Gregg v. Von Phul** (1864), 1 Wall. 274, 17 L. Ed. 536, at 537:

> "The doctrine of estoppel in pais or by the act of the parties is founded in natural justice and is a principle of good morals as well as law.' 'The primary good of the doctrine is that it would be a fraud in the party to assert what his previous conduct had denied when on the faith of that denial others have acted.' " Citing cases.

In **Daniels v. Tearney** (1880), 102 U. S. 415, 26 L. Ed. 187, at 188, the court refers to the doctrine as a "conservator," like the statute of limitations, and goes so far as to say: "Without it society could not well go on."

Estoppel is most commonly applied in questions of legal capacity to contract. The doctrine has very commonly been applied where the question has to do with the capacity of one of the parties to contract (as in this case, involving the eligibility of the Independent for a close shop contract). The rule of estoppel in matters of capacity is stated as follows:

> "If in a particular transaction or course of dealing, the authority, capacity, character or status of one of the parties is recognized or asserted as one of the basic facts upon which the transaction proceeds, both parties are as a rule estopped to deny that the one occupied that position or sustained that character, and the rule has been applied with respect to guardians, partnerships, personal representatives, school trustees and agents." 21 C. J., p. 1237, Estoppel; Section 243.

IV.

Through no fault of petitioner and upon technical grounds the court has denied argument on the facts and with respect to the propriety of the heavy penalties imposed in this case.

Were the unfair practices willful? How is the case affected by the petitioner's reliance upon a valid settlement contract? Is there not room for a concession by the court that the legal issues were so close as to warrant appeal to the courts? These questions have not been argued or submitted.

The petitioner was advised prior to argument in this case that the court did not care to hear argument on the question of the sufficiency of the evidence.* The peti-

*The petitioner in this case, prior to argument, wrote to the Clerk of the court asking him to submit a request for enlargement of time, the petitioner feeling that a mere statement of the facts would more than absorb the half hour allowed for argument, and was advised: "The Court directs me to inform you that they do not consider it necessary to extend the time for oral argument in the cases of The Wallace Corporation and Richwood Clothespin and Dish Workers Union vs. National Labor Relations Board, Nos. 66 and 67, the reason that the court does not care to hear argument on the question of the sufficiency of the evidence."

tioner interpreted this to exclude argument on the findings of unfair practices preceding the settlement agreement and therefore closely limited the discussion of facts which are now quite evidently controlling in the majority decision.

The court has not expressly so stated, but is manifestly much influenced, in affirming the severe penalties in this case, by the Board's findings of fact on petitioner's conduct prior to the settlement. For reasons hereinafter more fully set forth, petitioner submits that due to inferences which are unsupported by the findings of the Board, the court has erroneously concluded that this petitioner, throughout, was deliberately and willfully defying the law. This was not the finding of the Board, which based its opinion on the presence of one unfair practice subsequent to the settlement, namely, the making of the closed shop contract.

The briefs and the argument of the petitioner were accordingly occupied almost exclusively with the issue posed and presented by the Board itself, namely, the construction of the closed shop clause of the statute. Petitioner in its brief reduced almost to the vanishing point its discussion of the settlement agreement as a defense, and the effect of petitioner's contractual obligations to make the closed shop contract. The point has received the scant consideration of the court, as indicated below.

As to the assessment of penalties, the propriety of such penalties in this case was not argued. It has been held by the Board that penalties are not appropriate where the employer believed it was required to deny employment under a closed shop contract, like that in the present case, and where the legal rights and obligations of the parties, under the contract were in doubt. **M. & M. Woodworking Co.**, 6 NLRB, p. 372, at 383, approved by the Circuit Court of Appeals, 9th Circuit, 101 Fed. (2d) 938.

Perhaps the court will now recognize that despite the

divergence of view represented by the minority and majority justices in this case, that the questions involved are difficult and close. It would seem to the petitioner that if the case is close enough to warrant a division in the court, petitioner should not be penalized for an erroneous solution of its dilemma. The minority opinion of this court concludes that the petitioner was right, even resolving all questions of fact against the petitioner.

The petitioner did contend in its original brief and in argument that it was manifestly unfair and improper to charge the petitioner with back pay of twelve employees who admittedly and by stipulation were not excluded by the Independent union, but by their own voluntary act failed to qualify for employment, never having applied for membership in the Independent union. If there was no discrimination by the Independent in such a case, a fortiori there can be no discrimination by the petitioner. Even this circumstance is neglected by the court.

V

The majority opinion contains findings of fact which enlarge upon the findings of the Board and are not supported by the record.

Petitioner respectfully submits that the majority opinion goes beyond the findings of the Board in a number of instances. The cumulative effect of these enlargements upon the alleged offenses of the employer may explain the punitive element of the court's decision in sustaining the penalties. The court has evidently concluded, going beyond the conclusions of the Board, that the alleged unfair practices in this case were deliberate, willful and premeditated.

Has not the court overlooked, first, that the Independent did not appear until after the strike started, and second, that the unfair practices charged against the em-

ployer rest in substantially all cases upon the doctrine of respondeat superior?

The court, for example, has stated that there was "abiding hostility on the part of the company to any recognition of the CIO union."* It is admitted by union witnesses that the issue upon which the strike was called was a question of how to determine majority representation. (See Petitioner's Brief herein, pp. 8-9, for record citations.) The company was not required by law or by the spirit of the law to asquiesce in the first demand for a card count. Only slight experience with collective bargaining demonstrates the unwisdom of accepting card counts in such cases. Is the refusal to accept a card count reasonably to be considered "abiding hostility"? Must an employer walk into the union camp or be called unfair?

The company countered with a request for a Labor Board election. At that time there was no independent union in the field. The election would have been a "yes or no" election (a form of election somewhat discredited abroad). The readiness of the company to suggest such an election rebuts the implication of any "abiding hostility."

The excuse given by the union for refusing the election was their demand that Dodrill be reinstated. The record shows no charge pending of unfair practices at that time. [The second amended charge is dated Otober 9th (R. 312). Wallace testified (R. 271) that the CIO threatened charges on the day the strike was called, so presumably no charges were then on file. The first charge was evidently about October 4, a week or more after the strike (R. 42).] The company never admitted fault in the Dodrill case but submitted it to arbitration. The company is nevertheless reproached for unfairness to Dodrill, after settling his claims. The Board itself said (R. 10, footnote 11): "Dod-

*Mr. Wallace, proprietor of this business, stated he was perfectly willing to bargain collectively with any union that had a majority (R. 270, 279); he said he thought collective bargaining was "smart" and "he was for it" (R. 279).

rill * * *, his discharge in August is not in issue in this proceeding." But in any case, hostility to Dodrill, who, he said himself (R. 151) was characterized as an "agitator"** can hardly be enlarged to an "abiding hostility" to recognition of the CIO union in the face of this record. We ask the court to distinguish between hostility to recognition of the CIO and a legal refusal by the company to accept superficial evidence of majority. Certainly the final election, which is unassailed, showing a majority by the Independent, sustains to some extent the company's doubt as to the validity of the card count method, even though the CIO strike may have alienated some of its original adherents.

The following additional examples of statements in the majority opinion are cited in support of petitioner's contention that specific conclusions of the court are not justified by the record:

1. **The Evolution of Hearsay Evidence.** The court says that the company "publicly proclaimed through one of its foremen that 'the ones that did not sign up with the CIO didn't have anything to worry about; the company would see that they was taken care of.'" This statement is no doubt based on the testimony of a witness who referred to "rumors" in the plant and to what a foreman "told us in the factory." This testimony, which the court holds significant, was based on the following "long-distance" hearsay of witness Roxie Dodrill (R. 118):

> "Q. And did you ever at any time have any conversation with your foreman Sleeth with reference to the CIO? A. Yes, sir.
>
> Q. When did you have such a conversation? A. Well, just before the strike, Mr. Sleeth and I was talking and it was rumored around the factory that——

**The court enlarges this characterization of Dodrill into a "categorization" of C. I. O. members as agitators.

Trial Examiner Spencer: If you please, just tell us what was said.

The Witness: I asked Mr. Sleeth what he told us in the factory about the company taking care of the people and he said that Mr. Davis had been down to St. Louis and had talked with Wallace and he said Wallace told him not——

Mr. Chubb: We will object again to this long distance repetition of what Sleeth said Davis said Wallace said in St. Louis. I think it is going just a little bit too far.

Mr. Shroyer: All of them, I think, are officials of the company.

Trial Examiner Spencer: I will overrule the objection. Tell us what Mr. Sleeth said to you.

The Witness: Mr. Sleeth said he was told to tell the people, the ones that did not sign up with the CIO didn't have anything to worry about, that the company would see that they was taken care of."

The testimony was by a highly interested witness about a conversation held a year previously.

Sleeth denied he made the statement (Tr. 577). Wallace corroborates Sleeth (R. 279).

Now, note the effect of this testimony: To the Board, this testimony is not evidence of what was said alone, nor of statements by a foreman (who said he had been instructed to stay neutral (Tr. 576)). It proves, in the words of the Board (R. 20): "A third foreman **disclosed that the respondent would make suitable provision for those employees who did not join the union.**"

This court then develops this same testimony into a "public proclamation."

2. **The court overlooks admitted facts** where it says "the company apparently preferred to close down this one of its two plants rather than to bargain collectively with the CIO."

We assume the court has reference to evidence of remarks of foremen prior to the strike. Mr. Wallace, however, was the President of the company and the Wallace Corporation was entirely his, the stock representing advances made by him personally prior to reorganization (R. 269).

Now, this question of preferring to close the plant rather than bargain collectively with the CIO is discussed by the Board and it has this to say (R. 14):

> "On January 12, 1942, President Wallace and William T. Christmas, Vice President and Treasurer of the respondent, who maintain offices at St. Louis, Missouri, arrived in Richwood for the avowed purpose of deciding either to reopen the plant or to close it permanently. After discussing the matter with Richwood inhabitants and Independent adherents who desired to return to work, Wallace decided to resume plant operations the next day. * * * That night respondent met with representatives of both unions. The meeting culminated in the settlement agreement dated January 13, 1942, calling for immediate cessation of the strike, and the plant resumed operations that day."

There is no dispute about the facts so stated by the Board. They rebut the statement of the court that the company preferred to close its plant down rather than bargain with the CIO. The settlement contract was a bargain with the CIO and it demonstrated a willingness to recognize them if they prevailed in the election. The course of action should be more eloquent than the strikers' reports of what the foremen said to the strikers.

3. The court is in error in making the statement that the settlement agreement plainly implied that the old employees could retain their jobs with the company simply by becoming members of whichever union should win the election.

The settlement agreement which is dated January 13, 1942, is very brief on this point, but contains no implications. (The following proviso reserving the right to "hire," evidently contains a misprint, for the word "fire." One doesn't "hire" for just cause.) It says (R. 55):

> "The company further agrees that if either union is proven to represent a majority of its employees by said vote, it will recognize a union shop, providing that the company shall at all times retain the right to suspend, hire or discharge any employee for proper and just cause."

If there is any implication in this agreement, it is to the contrary (R. 54):

> "The company agrees not to coerce or intimidate any of its employees in regard to union membership and further agrees that none of its foreman or any other of its employees not eligible to be union members shall exercise such coercion, solicitation or intimidation for either union."

4. **The court is in error** in stating that the company "admits that had there been no union shop agreement, discharge of employees **on account of their membership in the CIO** would have been unlawful discrimination contrary to Section 8 (3) of the Act." The petitioner does not recollect such an admission, but certainly did not admit the motive. The facts do not support any implication of such a motive. The court, like the Board, ascribes and imputes the motives of the Independent to the employer without any evidence in support. The company took back all CIO employees after the strike, including Dodrill, and amply evidenced its desire to reinstate the employees after the lay-off. There was no evidence whatever that the company even knew that the excluded employees were former members of the CIO. The record shows that a large number of former CIO members were re-employed by the com-

pany and were kept on the pay roll after the time of the lay-off (R. 123, Smith and seven others; R. 124, Givens; Green, R. 192). The dividing line was, of course, employees who had joined the Independent, and those who had not. This was the dividing line required by the closed shop contract and had no reference to membership in the CIO.

5. **The court in its majority opinion overlooks the fact that twelve of the discharged employees never applied for membership in the Independent union** (R. 99). It is respectfully submitted that, with respect to these there was no act of discrimination on the part of the Independent nor on the part of the company. The line of exclusion from employment was not the line of exclusion from membership in the Independent. Penalizing the company for the inaction of these employees must surely be an oversight.

6. **The court has misconstrued the correspondence between the company and the Regional Director.**

The correspondence subsequent to March 20, 1942, between the Regional Director and the company (principally by counsel) was introduced in the record to show two facts: first, that the company **thought** it was bound to the course it took, and, second, to show that the Regional Director, up to the time of the complaint, never claimed that the company had violated the settlement contract. The Board, it will be recalled, had charged (and in its first opinion found) violation of the settlement agreement by the company, which would certainly have disposed of this case. This opinion was, of course, vacated (R. 5).

At the hearing the first effort of the petitioner was to show its own compliance with the settlement which it was pleading. Its first task was to show that there was no violation of the settlement agreements between the date of the settlement and the date of the election.

The court gives considerable weight to this correspondence. It is evidently the basis upon which the court concludes that the union shop contract was entered into against the advice of counsel. If the court implies that counsel had advised that it was illegal to make such a contract, then the inference of the court is clearly unwarranted. The record shows a letter dated April 13, 1942 (Resp. Ex. 22, R. 299), in which counsel made it clear to the Board that he did not approve the closed shop policy of the law and for this reason had advised against making the closed shop stipulation in settlement. The letter shows on its face, however, that counsel considered that the contract for a closed shop was legal. The very same letter states the opinion of counsel that it would be a violation of the contract to return the people to work. Counsel asked for some illumination on that question. The letter also comments on the Vacuum Electric case. Counsel in the previous letter of April 6th had denied any interference with the Independent union which, of course, would deny the application of the Vacuum Electric case.

Counsel plainly stated that there was no vice in the contract, and took, in substance, the position which was urged before the Board and which is now urged before this court. Any other conclusion reflects upon the sincerity of counsel in this case.

The company signed the closed shop contract, not because it liked it, but because it feared stoppage (R. 224) and breach of contract if it didn't. That was the "necessity" referred to by counsel. Counsel and the company may have been mistaken, but there was no opinion of counsel that the course was illegal, nor any refusal to follow legal advice.

The Court judges from the correspondence that there was "something more" that this employer could have done when it received the urgent request of the Regional Director that it reinstate the employees. Petitioner has

never understood the Regional Director's request. On its face it looked like a request for inaction pending decision. Actually it was a request to reinstate. The request required complete reversal of position, namely, employment of non-members of the Independent who had already been laid off, and breach of the closed shop contract. The employer feared that this would again close the plant. (R. 224).

The Board then suggested and the Court now suggests, in other words, that the petitioner should have reinstated the discharged employees forthwith. This was not only to risk another stoppage of the plant—it was to risk the entire settlement and run the danger of renewed discord. It was flying in the face of the contract and of the warnings which the petitioner had previously received not to interfere in union matters. The request of the Board was unreasonable in the opinion of the petitioner under all the circumstances. After all the trouble it had had, the petitioner was more than justified in "hewing to the line."

7. **Clarification of the language of the court is desirable** to limit the responsibility of employers for union exclusion.

While it may not be significant to the legal profession, petitioner has noted some lay discussion of the majority decision in this case which bears out the minority opinion that the decision may prove embarrassing. In David Lawrence's widely syndicated newspaper column, as an example, printed in the St. Louis Globe-Democrat December 31, 1944, Mr. Lawrence cites this decision of the court in connection with the seizure of Montgomery Ward by the government in the controversy over the "maintenance of membership" clause. Mr. Lawrence quotes the statement of the Court that the petitioner was not "compelled by law to enter into a contract under which it knew that discriminatory discharges of its employees were bound to occur."

Says Mr. Lawrence: "This is precisely the contention of Ward's. Mr. Avery argues that one worker who does not join the union can be retained on the job, but the employer must dismiss a fellow worker who, having joined a union, finds the dues or the rules irksome and wants to resign." Mr. Lawrence also quotes at length the minority opinion to show that Congress never has undertaken to regulate union practices.

Did the court anticipate that this decision would give comfort to Mr. Sewell Avery?

The Area of Disagreement in this case. We take it that both minority and majority Justices are agreed that employer interference in union affairs is undesirable and unwarranted. We take it also that minority and majority would agree that "the spirit of exclusion" which is a phase of the closed shop may be undemocratic and oppressive.

The court divides on the question of the employer's function. The majority Justices conceive of a trade union not only as subject to governmental protection from employers, but also subject to employer regulation, placing a responsibility on the employer to protect minorities from majority unions where the latter exclude the former. The minority Justices, on the other hand, conceive of unions as autonomous, responsible associations, governing their own affairs, free from employer interference, subject only to legislative controls. Unions are coming of age, on this theory, and some public regulation may be the next step. It follows that if there are abuses in union practice, they should be regulated directly and not through a mischievous delegation of authority to the employer, placing upon him the responsibility for deciding when the unions are or are not unfair to the minorities, at the same time that he bargains in his own behalf for the best terms he can get from the majority.

Petitioner goes one step further and claims that any self-respecting trade union should expect to be held to responsibility for honorable performance of its just obligations. It does not and should not follow that, because the law protects unions from employer interference, it intends to degrade them to a place of legal dependency, and irresponsibility for their own obligations. Quite the reverse should be inferred. The grant of privileges and immunities should increase responsibility.

Petitioner agrees that the battle of the unions for recognition and equality before the law has virtually been won. The minority Justices have correctly sensed the spirit of the times. A frank and temperate recognition at this time of union abuses, and of the helplessness of the National Labor Relations Board to remedy them under the present statute, can do no injury to the progress that organized labor has made. A patent injustice to an employer, as in the majority interpretation of the Act, may multiply resentment and produce disunity far more dangerous to progress.

CONCLUSION.

The court has manifestly given close attention to this case, and it is only the importance of the issues which could justify a request for rehearing.

While the case itself is not of any magnitude, it involves common and significant attitudes in the employer-employee relationships. The petitioner believes further that important legal and ethical principles are at stake.

Moreover, it is difficult to take a detached and dispassionate view of cases of this kind. The controversy lies at the nerve center of economic conflict.

Petitioner asks no more than this: That the court respond in the same spirit in which the petition is addressed to the court. This case was moderately and tolerantly presented, to minimize violence and ill feeling. The court

may have observed that the petitioner has not attacked unionism generally or even the CIO; petitioner has attacked only the repudiation of a bargain and of an honest settlement. Petitioner has even limited his attack on the closed shop policy to the undemocratic exclusionary features of the closed shop. Petitioner, moreover, has not attacked the National Labor Relations Act. Petitioner has asked only recognition that the Act does not in fact purport to place curbs on union excesses. Nor has the petitioner attacked the good faith of the Board. Petitioner insists merely that in its preoccupation with enforcement of the Act, the Board has placed too low a value upon scrupulous observance of contract obligations. These principles are just as essential to unionism as they are to other business interests. They are even more vital to administrative procedure than to the courts of justice. The petitioner is distressed that the court has not seen fit to render some slight homage to the wisdom of these principles.

The principles of fair dealing should not be dismissed as mere "middle class morality." There is a certain sly wisdom in the saying of the French that "The bourgeois heart is on the left, but his pocket book is on the right." Fundamental ethical principles, however, antedate both the industrial revolution and our judicial system. They constitute a common element permeating all religions. They should be quite adequate to unify the intellectual and emotional disunity of the passing economic conflict.

This brief is written at a time when, in the wake of our liberating armies in Europe, contending factions are fighting in the streets of Athens, as they have fought in other liberated countries. There surely could be no prospect more discouraging to the friends of democracy and to the lovers of freedom. No one can evaluate the factors that have brought about such disunity—misery, oppression, age-old resentments. We only know that the economic

struggle is involved, more than political issues, and we know that there has been a failure of the forces of reconciliation.

In the American scene, we have never approached the distrust, hatred and doctrinaire theories which have divided Europe. Some of us live in the faith that this may be due in substantial degree to our traditional devotion to reasoned judicial processes. Petitioner, in loyalty to these processes, has prosecuted and submitted this case, upon the philosophy that the good can be distilled and recognized, and the evil disowned, on either side of the conflict between organized labor and the opposing interests. With due deference to the court, the petitioner believes that further consideration may serve to reconcile the wide divergence of opposing views in this case, and thus moderate the punitive features of the court's decision.

Respectfully submitted,

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Of Counsel.

SUPREME COURT OF THE UNITED STATES.

Nos. 66 and 67. OCTOBER TERM, 1944.

The Wallace Corporation, Petitioner, 66 *vs.* National Labor Relations Board.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
Richwood Clothespin & Dish Workers' Union, Petitioner, 67 *vs.* National Labor Relations Board.	

[December 18, 1944.]

Mr. Justice BLACK delivered the opinion of the Court.

In an attempt to settle a labor dispute at the plant of petitioner company, an agreement approved by the Board was signed by a C.I.O. union, an Independent union, and the company. At a consent election held pursuant to this agreement, Independent won a majority of the votes cast,[1] and was certified by the Board as bargaining representative. The company then signed a union shop contract with Independent, with knowledge—so the Board has found—that Independent intended, by refusing membership to C.I.O. employees, to oust them from their jobs. Independent refused to admit C.I.O. men to membership and the company discharged them.

In a subsequent unfair labor practice proceeding the Board found that (1) Independent had been set up, maintained, and used by the petitioner to frustrate the threatened unionization of its plant by the C.I.O., and (2) the union shop contract was made by the company with knowledge that Independent intended to use the contract as a means of bringing about the discharge of former C.I.O. employees by denying them membership in Independent. The Board held that the conduct of the company in both these instances constituted unfair labor practices. It en-

[1] Of 207 eligible employees, 98 voted for Independent, 83 for the C.I.O., and 26 did not vote.

tered an order requiring petitioner to disestablish Independent, denominated by it a "company union"; to cease and desist from giving effect to the union shop contract between it and Independent; and to reinstate with back pay forty-three employees, found to have been discharged because of their affiliation with the C.I.O., and because of their failure to belong to Independent, as required by the union shop contract.[2] The Circuit Court of Appeals ordered enforcement of the Order.[3] We granted certiorari because of the importance to the administration of the Act of the questions involved. 322 U. S. 721.

The Board's findings if valid support the entire order. This is so because Section 8(3) of the Act[4] does not permit such a contract to be made between a company and a labor organization which it has "established, maintained or assisted."[5] The Board therefore is authorized by the Act to order disestablishment of such unions and to order an employer to renounce such contracts.[6] Nor can the company, if the Board's findings are well-grounded, defend its discharge of the C.I.O. employees on the ground that the contract with Independent required it to do so. It is contended that the Board's findings are not supported by substantial evidence. As shown by its analysis, the Board gave careful consideration to the evidence before it relating to the unfair labor practices which occurred both before and after the settlement agreement and the certification. The Circuit Court of Appeals unreservedly affirmed the Board's findings, and we find ample substantiating evidence in the record to justify that affirmance. We need therefore but briefly refer to the circumstances leading to the Board's order.

The findings of the Board establish the fact of an abiding hostility on the part of the company to any recognition of a C.I.O. union. This hostility we must take it extended to any employee who did or who might affiliate himself with the C.I.O. union. The company apparently preferred to close down this one of its two

[2] 50 N. L. R. B. 138.

[3] 141 F. 2d 87.

[4] Section 8(3) contains a proviso to the effect that nothing in the Act "shall preclude an employer from making an agreement with a labor organization (*not established, maintained, or assisted by any action defined in this Act as an unfair labor practice*) to require as a condition of employment membership therein . . . ." (Italics added.)

[5] Labor Board v. Electric Vacuum Cleaner Co., 315 U. S. 685, 694.

[6] I. A. of M. v. Labor Board, 311 U. S. 72, 81-2; Labor Board v. Falk Corp., 308 U. S. 453, 461.

plants rather than to bargain collectively with the C.I.O. It publicly proclaimed through one of its foremen that ". . . the ones that did not sign up with the C.I.O. didn't have anything to worry about . . . the company would see that they was taken care of." The settlement agreement plainly implied that the old employees could retain their jobs with the company simply by becoming members of whichever union would win the election. Nevertheless, the company entered into an agreement with Independent which inevitably resulted in bringing about the discharge of a large bloc of C.I.O. men and their president.

The contract was executed after notice to the company by the business manager of Independent that Independent must have the right to refuse membership to old C.I.O. employees who might jeopardize its majority. This business manager, who had himself originally been recommended to Independent by a company employee, wrote the company, prior to the making of the contract, that Independent insisted upon a closed shop agreement because it wanted a "legal means of disposing of any present employees" who might affect its majority, and "who are unfavorable to our interests." The contract further significantly provided that the company would be released from the clause requiring it to retain in its employ union men only, if Independent should lose its majority and the C.I.O. win it.[1]

Neither the Board nor the court below found that the company engaged in a conspiracy to bring about the discharge of former C.I.O. members. Both of them, however, have found that the contract was signed with knowledge on the part of the company that Independent proposed to refuse to admit them to membership and thus accomplish the very same purpose. By the plan carried out the company has been able to achieve that which the Board found was its object from the beginning, namely, to rid itself of C.I.O. members, categorized by its foreman as "agitators."

It is contended that the Board's finding as to company domination has no support in the evidence because the evidence as to company domination antedated the settlement and certification, and hence was improperly admitted. The argument is that the

[1] The contract reads: "It is mutually agreed by both parties hereto that should the Union at any time become affiliated in any way with any labor organization or federation having membership or local union affiliations in more than one town outside of the City of Richwood, West Virginia, this clause (E) of Article I shall immediately become null and void, ...".

Board cannot go behind the settlement and certification. The petitioner does not argue that any language appearing in the Labor Relations Act denies this power to the Board, but relies upon general principles on which the judicial rule governing estoppel is based. Only recently we had occasion to note that the differences in origin and function between administrative bodies and courts "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts." *Federal Communications Commission* v. *Broadcasting Co.*, 309 U. S. 134, 143. With reference to the attempted settlement of disputes, as in the performance of other duties imposed upon it by the Act, the Board has power to fashion its procedure to achieve the Act's purpose to protect employees from unfair labor practices. We cannot, by incorporating the judicial concept of estoppel into its procedure, render the Board powerless to prevent an obvious frustration of the Act's purposes.

To prevent disputes like the one here involved, the Board has from the very beginning encouraged compromises and settlements.[8] The purpose of such attempted settlements has been to end labor disputes, and so far as possible to extinguish all the elements giving rise to them. The attempted settlement here wholly failed to prevent the wholesale discard of employees as a result of their union affiliations. The purpose of the settlement was thereby defeated. Upon this failure, when the Board's further action was properly invoked, it became its duty to take fresh steps to prevent frustration of the Act. To meet such situations the Board has established as a working rule the principle that it ordinarily will respect the terms of a settlement agreement approved by it.[9] It has consistently gone behind such agreements, however, where subsequent events have demonstrated that efforts at adjustment have failed to accomplish their purpose, or where there has been a sub-

[8] Apparently more than 50% of all cases before it have been adjusted under its supervision. See First Annual Report of the National Labor Relations Board (1936), pp. 30-31; Second Annual Report (1937), pp. 15-15; Third Annual Report (1938), pp. 20-22; Fourth Annual Report (1939) pp. 19-22; Fifth Annual Report (1940), pp. 14, 16-18, 20, 26; Sixth Annual Report (1941), pp. 14-15, 25, 26, 27, 29; Seventh Annual Report (1942), pp. 22-25, 28-30, 80-86; Eighth Annual Report (1943), pp. 20-23, 91, 92.

[9] Matter of Corn Products Refining Co., 22 N. L. R. B. 828, 828-829; Matter of Wickwire Brothers, 16 N. L. R. B. 316, 325-326; Matter of Godchaux Sugars, Inc., 12 N. L. R. B. 568, 576-579; Matter of Shenandoah Dives Mining Co., 11 N. L. R. B. 885, 888; cf. Matter of the Locomotive Finished Material Company, 52 N. L. R. B. 922, 927.

sequent unfair labor practice.[10] We think this rule adopted by the Board is appropriate to accomplish the Act's purpose with fairness to all concerned. Consequently, since the Board correctly found that there was a subsequent unfair labor practice, it was justified in considering evidence as to petitioner's conduct, both before and after the settlement and certification.

The company denies the existence of a subsequent unfair labor practice. It attacks the Board's conclusion that it was an unfair labor practice to execute the union shop contract with knowledge that Independent at that time intended to deny membership to C.I.O. employees because of their former affiliations with the C.I.O. It admits that had there been no union shop agreement, discharge of employees on account of their membership in the C.I.O. would have been an unlawful discrimination contrary to Section 8(3) of the Act. But the proviso in Section 8(3) permits union shop agreements. It follows therefore, the company argues, that, inasmuch as such agreements contemplate discharge of those who are not members of the contracting union, and inasmuch as the company has no control over admission to union membership, the contract is valid and the company must discharge non-union members, regardless of the union's discriminatory purpose, and the company's knowledge of such purpose. This argument we cannot accept.

The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. Otherwise, employees who are not members of a selected union at the time it is chosen by the majority would be left without adequate representation. No employee can be deprived of his employment because of his prior affiliation with any par-

[10] Matter of Locomotive Finished Material Company, *supra*, 926-928; Matter of Chicago Casket Company, 21 N. L. R. B. 235, 252-258; Matter of Harry A. Halff, 16 N. L. R. B. 667, 679-682; cf. Matter of Wickwire Brothers, *supra*. The courts have approved the Board's practice in this respect. N. L. R. B. v. T. W. Phillips Gas & Oil Co., 141 F. 2d 304, 305-6 (C. C. A. 3); N. L. R. B. v. Hawk & Buck Co., 129 F. 2d 903, 904-5 (C. C. A. 5); N. L. R. B. v. Thompson Products, Inc., 159 F. 2d 363, 366-67 (C. C. A. 6); Canyon Corp. v. N. L. R. B., 128 F. 2d 953, 955-956 (C. C. A. 8); Sperry Gyroscope Co. v. N. L. R. B., 129 F. 2d 922, 931 (C. C. A. 2). See Warehousemen's Union v. N. L. R. B., 121 F. 2d 64, 68-69 (App. D. C.) cert. den. 314 U. S. 674.

ticular union. The Labor Relations Act was designed to wipe out such discrimination in industrial relations. Numerous decisions of this Court dealing with the Act have established beyond doubt that workers shall not be discriminatorily discharged because of their affiliation with a union. We do not construe the provision authorizing a closed shop contract as indicating an intention on the part of Congress to authorize a majority of workers and a company, as in the instant case, to penalize minority groups of workers by depriving them of that full freedom of association and self-organization which it was the prime purpose of the Act to protect for all workers. It was as much a deprivation of the rights of these minority employees for the company discriminatorily to discharge them in collaboration with Independent as it would have been had the company done it alone. To permit it to do so by indirection, through the medium of a "union" of its own creation, would be to sanction a readily-contrived mechanism for evasion of the Act.

One final argument remains. The company, it is said, bargained with Independent because it was compelled to do so by law. The union shop contract to which the company at first objected, but into which it entered against the advice of counsel, was the result of that bargaining. The company, it is pointed out, persistently though unsuccessfully sought to persuade Independent to admit C.I.O. workers as members of Independent. Hence, we are told, the company did all in its power to prevent the discharges and should not be held responsible for them. Two answers suggest themselves: First, that the company was not compelled by law to enter into a contract under which it knew that discriminatory discharges of its employees were bound to occur; second, the record discloses that there was more the company could and should have done to prevent these discriminatory discharges even after the contract was executed. Immediately after the discharge of this large group of employees, the Labor Board complained to the company. The company appealed in writing to Independent's business manager to admit the men to membership, and thus make possible their reinstatement. This appeal was rejected. The Board then called to the company's attention our decision in *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, asserting that under its authority the men had been illegally discharged

and should be reinstated. In subsequent correspondence, the Board suggested to the company that if it should later be required to reinstate the discharged employees, it would have only itself to blame, since it had voluntarily dispensed with their services. It insisted that the company was taking a needless risk of liability because if the Board should hear charges and dismiss them, the men could then be discharged, but if on the other hand, the Board should sustain the complaint, the discharged employees "would have retained their positions and your client would have no further liability because of their wrongful discharge." The Board's representative at that time wrote the company, "I again beseech you to return them to work pending a decision of the National Labor Relations Board on this question."

It follows from what we have said that we affirm the judgment of the court below approving the order of the Board in its entirety.

Affirmed.

SUPREME COURT OF THE UNITED STATES.

Nos. 66 and 67.—October Term, 1944.

The Wallace Corporation, Petitioner, 66 *vs.* National Labor Relations Board. Richwood Clothespin & Dish Workers' Union, Petitioner, 67 *vs.* National Labor Relations Board.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[December 18, 1944.]

Mr. Justice Jackson, dissenting.

A more complete statement of the facts than is found in the Court's opinion is necessary to disclose the reasons why the Chief Justice, Mr. Justice Roberts, Mr. Justice Frankfurter, and I dissent.

The Wallace Manufacturing Company employs about 200 employees and makes clothespins and similar wood products at Richwood, a small community in West Virginia. In July 1941 a union affiliated with the C.I.O., which after the practice of the Court's opinion we will call the C.I.O., began to organize these employees, and the Company engaged in counter measures. Without detailing the evidence or considering the merits of the Company's objections we will assume that the Company during this period was guilty of unfair labor practices.

On September 25, the C.I.O. called a strike. About October 2, the Independent union, one of the petitioners here, came into being. On October 10, 1941, the C.I.O. filed charges with the Labor Board, alleging among other things that the Company had violated the Act by sponsoring the formation of the Independent. Again, without weighing the evidence or the objections of the Company or of the Independent, we will assume that the Company was guilty.

On October 14, the Independent demanded recognition as bargaining representative of the employees, and on October 31, it

filed with the Labor Board a petition for investigation and certification of it as the representative of the Company's employees.

The Board, however, did not proceed on either the complaint or the request for certification. Instead, as the Government states, "During the ensuing two and one-half months, representatives of petitioner [the company], the Board, and the two unions engaged in negotiations looking toward settlement of the entire controversy, including disposition of the Union's charge and the Independent's petition." Again, without considering the Company's or the Independent's objection or evidence, we will assume that during this two and a half months the Company engaged in unfair labor practices. The strike was proceeding, however, with much bitterness and some violence. On December 30, the strike then being in its fourth month, the C.I.O. by telegram offered, with the approval of the Labor Board, to enter into a consent election "with you and your Company Union, on the condition that when we prove a majority and become the exclusive bargaining agency for all your employees, that as a condition of employment all eligible employees must become members of Local Union 129, U.C.W.O.C." The closed-shop proposal was thus first brought forward by the C.I.O. On January 13, the C.I.O. and the Independent and the Company signed an agreement that the plant should be opened, that everyone should return to work, that the Company would not in any way influence its employees for or against either union, and that the unions would not exercise any coercion. The Company agreed to recognize as exclusive bargaining agent whichever union was proved by a vote conducted by the Board to represent a majority of its employees and to start negotiations immediately after the result of the election was determined and to grant a union shop. All parties are agreed that they employed "union shop" as the equivalent of "closed shop." There is no finding and no evidence that at the time the company entered into this obligation it had any foreknowledge as to which union would win or what the practice of either as to admission of members would be, nor is there any evidence that either union had decided upon any policy in anticipation of victory. There is, no charge, no finding, and no evidence that the Company has not performed its part of this agreement scrupulously.

The parties took this agreement to the office of the Board's regional manager and on January 19 two agreements were drawn: one by which the C.I.O. withdrew the charges of domination and other charges; and the other for a consent election to determine the employees' choice of representative. Both of these agreements, after signature by all the parties, were approved in writing by the Regional Director, acting on behalf of the National Labor Relations Board and with full knowledge of the agreement that the Company would give to the winner a closed shop.[1]

The employees, without distinction as to union affiliation, all returned to work. The election was held January 30, under the auspices of the Board. Of the 186 valid votes cast, the Independent received 98, the C.I.O. 83, and 5 votes were cast for neither. The C.I.O. filed no objections, and the Board on February 4 certified the Independent as the exclusive bargaining agent for the employees in the plant.

Thereupon the Company bargained with the certified representative, as it was required by law to do. The evidence is uncontradicted that the Company was reluctant still to enter into a closed-shop agreement. The Independent, however, insisted that the Company perform the contract by which the strike had been settled. It stated its position in a letter in which it said: "The 'Closed Shop' will, therefore, give us some control in preventing the hiring of additional employees who are unfavorable to our interests and who would further jeopardize our majority. It would also provide us with a legal means of disposing of any present employees, including Harvey Dodrill whom our members have declared by unanimous ballot that they will not work with, whose presence in the plant is unfavorable to our interests because those who are so unfavorable will not be permitted to become members of our organization and without such membership they would not be permitted to work in the plant under a closed shop contract which we respectfully insist that we *must* have."

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[1] The Board has declared its policy with respect to consent elections as follows: "However, the Board does not ordinarily order elections in the presence of unremedied unfair labor practices, whether merely alleged or already found by the Board, unless the labor organization which instituted the charges has agreed in advance that it will not rely upon the unfair labor practices as a basis for objecting to the conduct or results of the election. The Board orders an election only when it is satisfied, after considering all evidence, respecting the employer's compliance with a prior order concerning unfair labor practices that 'an election free from all employer compulsion, restraints and interference, can be held.'" Eighth Annual Report (1943) 49.

This is the first knowledge it is claimed the Company had or should have had of the Independent's adoption of an exclusionary policy toward its rivals. The Company yielded, considering the union's membership policy as something it could not interfere with, and the closed shop contract was signed. It required that all present and future employees should become members of the Independent within ten days of the date of the contract or from the date of hiring. The contract and notice of the closed shop arrangement were posted in the plant. On March 18, forty-three employees were dismissed, on demand of the Independent, as not eligible for employment because of non-membership in it. Later it appeared that twelve such dismissed employees never made application for membership in the Independent and thirty-one members who had applied for membership had been rejected because when their applications came before the meeting in regular course they did not receive the number of ballots necessary under its by-laws to elect to membership. Whether the Company knew that they had applied for membership and had been rejected is disputed, but again we resolve the doubt against the Company and assume that the superintendent knew this fact at the time of discharge.

There is no dispute, however, that when Mr. Wallace, the president of the company, learned of the discharge he attempted to persuade the Independent to allow these employees to be reinstated. On March 20, 1942, he wrote to the business agent of the Independent a letter. The Board has not found that it was not written in good faith. To the contrary, counsel for the Board with commendable candor stated that there is no evidence and that he made no contention that it was other than a good faith statement of the Company's position. Among other things it says, "When our Mr. Christmas talked to you on March 9th, you will recall that he appealed to you to see that the closed shop clause, which your Union insisted be included in the working agreement, should not be used in any way to unfairly prevent any person from working who wanted to work. We realize, of course, that the contract does not give the Company the right to tell the Union who to admit as members, and for that reason Mr. Christmas' talk with you and mine over the telephone could only be directed to the sense of fairness which we believe exists in the minds of your members.

"Entirely aside from the fact that having to lay off this large number of experienced people will badly cripple our production which is urgently needed, we feel that it is indeed a sad situation where, account of some individual differences of opinion, people who have perhaps been friends and neighbors for many years cannot work together. I will appreciate your advising me what can be done."

The Regional Director of the Board was notified of the discharges and, as the Court's opinion states, he did urge the Company to disregard its closed-shop contract and re-employ non-members of the certified union. The Company's counsel reminded him that he had expressed concern about the closed-shop provision to the Regional Director when it was being negotiated, and that the Director had replied that he probably "would have to agree to it as the C.I.O. certainly would have insisted upon it if they had prevailed in the election." The Company insisted that "membership in the union is beyond the Company's control" and that unless the union relented it would stand by the closed-shop contract. The Company suggested, however, to the Independent that it conduct interviews with those it had rejected and reconsider them individually. The Union by unanimous vote rejected the suggestion. The Regional Director of the Board also wrote to the head of the Independent about the individuals discharged "because they were not members of your union. It develops that your union is unwilling to accept them into membership. I need not remind you of the seriousness of these charges." The Board representatives were unable to persuade the union to accept the rejected members nor the Company to repudiate its agreement.

At the opening of the hearing before the examiner July 9, 1942, the Company declared it was "ready to take any steps which are necessary to the end that these people be put back to work, as it has been throughout, since this agreement was entered into." It suggested that the attorney for the Board and the attorney for the Independent work out a settlement. The Board's attorney expressed "to the representative of the Company my thanks for the suggestion." Adjournment was taken and counsel for the union went from Summerville, the place of hearing, to Richwood and attended a meeting of the Independent union. The Board attorney's objection kept further developments out of the record except that he stated: "I am willing to let the record show that

Mr. Kitchie [attorney for the Independent] made me a proposition which I was unable to accept and that I made him one which he was unable to accept." The case therefore proceeded against the Company.

The Board did not find any unfair labor practice on the part of the Company between the date of the settlement agreement and the election. In fact, it refused to accept the recommendation of the trial examiner for such a finding, saying that "such interference, if any, was too trivial," was known to the C.I.O., which made no objection to the certification, and had come to the knowledge of the Regional Director prior to the election. "Nevertheless, he proceeded with the election, found it to be a fair one, and certified the Independent."

No unfair labor practices at any time after the settlement agreement are found or charged against the employer except the making and performing of the closed-shop agreement. The Board states its position as follows: "The issue remains whether, by entering into the closed-shop contract with the Independent with knowledge that the Independent intended to exclude employees from membership and by discharging employees denied membership in the Independent, as set forth above, the respondent violated the Act. The respondent contends that it was bound to enter into a closed-shop contract by the terms of the election agreement between the respondent, the Union, and the Independent, and urges the Board to regard the discharges as proper since made pursuant to the closed-shop contract.

"We do not agree. An employer may not enter into a closed-shop contract which to his knowledge is designed to operate as an instrument for effecting discrimination against his employees solely because of their prior union activities. The proviso in Section 8(3) of the Act permits an employer to enter into an agreement with the duly designated representative of his employees, requiring membership in that organization as a condition of employment. It is true that under the terms of the election agreement the respondent was bound to execute a union-shop contract with the victorious union. It by no means follows, however, that the respondent was also bound by the election agreement to acquiesce in a scheme to penalize employees whose choice of representatives was not that of the majority; nor can the proviso in Section 8(3) be thought to countenance such a result.

". . . The facts in the case make it apparent that the respondent [Company] was put on notice that its [Independent's] real purpose was to bar from future employment with the respondent persons who had adhered to the charging Union in the election campaign. While the tripartite agreement of January 13, 1942, may have been valid when made, performance of its terms did not require the respondent knowingly to become a party to the Independent's plan to eliminate from respondent's pay roll employees solely because of their past union activities. On the contrary, when this unlawful scheme became known to it, the respondent not only had a right to abrogate the tripartite agreement, but also was under an affirmative obligation to do so. . . . Under these circumstances, the closed-shop agreement cannot be deemed a defense, but a discriminatory device to insure perpetuation of the Independent and thus deprive employees of their statutory right to select bargaining representatives."

Holding that execution and performance of the closed-shop agreement after the settlement and certification by the Board were "unfair labor practices," the Board held them effective also to revive the old charges settled by the agreements and election and it went back to those events to find grounds on which to hold that the employer dominates the Independent.

Accordingly it ordered that the Company disestablish and withdraw all recognition from the Independent as representative of any of its employees. It forbade "any continuation, renewal, or modification of the existing contract which would perpetuate the conditions which have deprived employees" of their jobs; it ordered the Company to cease giving effect to any contract between it and the Independent or to any modification or extension thereof. It also ordered that the Company "offer the aforesaid 43 employees immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to make them whole for any loss of pay they may have suffered."

The underlying question is, in the language of the Board's brief, "Whether petitioner by entering into and discharging employees pursuant to the terms of the closed-shop contract with the Independent violated Section 8(3) and (1) of the Act." It is one of importance far beyond this little company and its two hundred employees.

Section 8(3) makes it an unfair labor practice for an employer, by discrimination, to encourage or discourage membership in any labor organization. If it ended there it would of course outlaw any closed shop, for the very essence of the closed shop is that the employer discriminates in employment to require membership in a particular union. To validate discrimination in such circumstances a proviso follows that no law of the United States "shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees. . . ."

At the time this closed shop agreement was made the Board had certified the Independent as representative of the employees. Under Section 8 it would have been an unfair labor practice had the Company refused to bargain with it. The Board made the certification, without objection by the defeated C.I.O. and with full knowledge that the Company was bound in law and in good faith to give the certified union a closed shop contract. We do not say, and it is not necessary now to decide, that the Board has no power to protect minorities at this stage of the proceedings. We do not mean to preclude the power of the Board, when the contract settling the strike, withdrawing charges against the company, and consenting to an election with a closed shop to the winner was brought to the Board, to have refused to dismiss charges and undertake an election unless each union agreed that, if it won a closed shop, it would open the union to membership from the losers on terms the Board deemed fair. Since no one could tell who would win, this would in any event have been an impartial arrangement. Even after the Independent won, the Board before certifying it might perhaps properly have made conditions as to reasonable terms to the defeated. But the Board made no conditions or reservations of the sort. Instead, it takes the position, and the Court is holding, that such conditions must be imposed on the union by the employer. He must see that the union with which he has been ordered to bargain makes proper terms for admission into that certified union of its former enemies and rivals. We think that the decision to that effect is not only unauthorized by Congress, but is utterly at war with the hands-off requirements which the law lays upon the employer, and that

this decision is at war with one of the basic purposes of labor in its struggle to obtain this Act and of Congress in enacting it.

Of course the closed shop is well known in labor relations. Its essential philosophy is that once the employees have chosen their representative union, it is entitled to bargain for the employer's help to maintain its control. Other employer aids to a dominant union, such as the check-off, are also conceded to unions by bargaining on behalf of a majority when they would not be at all permissible for the employer to use in the first place to influence the workmen to choose a particular union because he favored it. But the idea of the closed shop is that, while these acts of influence or pressure on workmen are unfair when exerted by the employer in his own interest, they are fair and lawful when enforced by him as an instrument of the union itself. A closed shop is the ultimate goal of most union endeavor, and not a few employers have found it a stabilizer of labor relations by putting out of their shops men who were antagonistic to the dominant union, thus ending strife for domination. It puts the employment office under a veto of the union, which uses its own membership standards as a basis on which to exclude men from employment.

Neither the National Labor Relations Act nor any other Act of Congress expressly or by implication gives to the Board any power to supervise union membership or to deal with union practices, however unfair they may be to members, to applicants, to minorities, to other unions, or to employers. This may or may not have been a mistake, but it was no oversight. We suppose that there is no right which organized labor of every shade of opinion in other matters would unite more strongly in demanding than the right of each union to control its own admissions to membership. Each union has insisted on its freedom to fix its own qualifications of applicants, to determine the vote by which individual admissions will be granted, to prescribe the initiation or admission fees, to fix the dues, to prescribe the duties to which members must be faithful and to decide when and why they may be expelled or disciplined. The exclusion of those whose loyalty is to a rival union or hostile organization is one of the most common and most understandable of practices, designed to defend the union against undermining, spying, and discord, and possible capture and delivery over to a rival. Some unions have battled to exclude Communists, some racketeers, and all to exclude those deemed disloyal to their purposes. See *Will*

iams v. *Quill*, 277 N. Y. 1, 7; *Miller* v. *Ruehl*, 166 Misc. 479, 2 N. Y. S. 2d 394.

There are those who think that the time has come when unions should be denied this control over their own affairs. However this may be, we only know that Congress has included no such principle expressly in the Act. If the Board should attempt to exercise it as we have suggested by way of a condition on its conducting an election or making a certification, a question of its statutory power to do so might arise, on which we express no opinion. It would at least be a forthright exercise of power over the unions by the Board itself acting in the public interest and would not require an employer to engage in interference with union affairs in direct violation of the Act.

But the Court is deciding not only that without authority of Congress the admission practices of a labor organization having a closed shop may be policed, but also, contrary as we think to the Act, that the employer is empowered and required to do the policing. This we think defies both the express terms and the philosophy of the Act. The letter of the Act makes it a forbidden practice for an employer to "interfere with" or "restrain" employees in the "right to self-organization." We assume this employer knew the Independent would exercise its power over admission privileges to some extent to protect itself against infiltration of hostile elements. The Board must have known it, too. And both must have known the C.I.O. would, also, if it won. However, the Independent has not indiscriminately excluded all who were against it in the election. The C.I.O. had 83 votes; all but 31 of these voters seem to have been admitted to the Independent, and 12 of those never applied, making 31 apparently rejected. In view of the bitterness and duration of the strike, involving some shooting, it is not strange that good will did not descend on the victors at once. The Board may have expected more moderation when it conducted the consent election and certified the Independent. There is nothing to show that the Company did not too. When it was found how harshly the Independent had behaved, the Company did try persuasion to get the union leaders to relent—the Company's own interests were to get back more of its experienced employees. How it could have done more without breaking both faith and the law, the Court does not point out, and we do not know.

Of course, if the employer in a closed shop is to be responsible for the discriminations or unfairness of the union, he must have a right to be informed about its admissions. If, in collective

bargaining, a union asked a closed shop, the employer would have to demand to know the rules and practices about admission, the fees, the by-laws, the method of electing members. If he should demand this as a condition of collective bargaining, we should expect the Board to hold him guilty of unfair practices, and we have no doubt it would ask this Court to sustain it. Yet here the sole ground of penalizing this employer is that he did not do just that. Should the employer have made the union admit all of its former enemies? If not, by what standard could he allow it to select? Must it also be made to admit even those who would not sign applications or pay initiation fees claimed to be too onerous? The employer is required to reinstate with back pay a dozen who never even asked to join the certified union. But neither the Court nor the Board says what the employer should have required the union to adopt as an admission policy.

The statute expressly permits a closed shop. It can be denied only when the certified union is "established, maintained, or assisted" by unfair labor practices of the employer. But the statute cannot mean that the making and performance of a closed shop contract in itself is an unfair practice which invalidates a closed shop. To so interpret it would be to believe the Congress by this provision was perpetrating a hoax. But if it means that the union can have a closed shop and the employer will supervise its membership, it is a strange contradiction in an Act whose chief purpose was to sterilize the employers and to free workmen of the influence they exerted through control of the right to work.

We can quite understand, and we do not mean to criticize, the motives which animated the Board. We are dealing here with an industry located in a small community where opportunities for other employment are probably not plentiful. It is not unlikely that denial of the right to work for this company will keep these men from earning a livelihood in a place they long have lived. In so far as the Board has been stirred by concern for individual and minority protection against arbitrary union action, we both understand and sympathize with their concern. The employer is the only one it can lay hands on, and the temptation is great to use him to protect minority rights in the labor movement. This and the other cases before us give ground for belief that the labor movement in the United States is passing into a new phase. The struggle of the unions for recognition and rights to bargain, and of workmen for the right to join without interference, seems to

be culminating in a victory for labor forces. We appear now to be entering the phase of struggle to reconcile the rights of individuals and minorities with the power of those who control collective bargaining groups. We have joined in the opinion in *Steele* v. *L. & N. R. Co.*, decided today. That case arose under the Railway Labor Act, which contains no authorization whatever for a closed shop, or the contract forbids the discrimination underlying the adoption of a closed shop, and deals with an industry and a labor group which never has had or sought a closed shop. But here we deal with a minority which the statute has subjected to closed-shop practices. Whether the closed shop with or without the closed union, should or should not be permitted without supervision is in the domain of policy-making, which it is not for this Court to undertake. Neither do we find any authority in the National Labor Relations Board to undertake it.

It happens to be an independent that won here. But counsel for the Board assumes on argument that this is not a one-way policy to require independent unions to admit their enemies. It would, as we understand it, have been applied in the same manner if the C.I.O. had won and had excluded some independent members on suspicion, perhaps, that they were company spies. The obstacle that this decision will interpose to all future bargaining for closed shops is likely to be felt by C.I.O. and A. F. of L. unions many times as often as by independents.

Of course it is the employer who is penalized here, and on shallow and superficial examination it may seem like another victory for labor. The employer must pay many thousands of dollars for hours unworked, because it performed reluctantly but in good faith its closed-shop agreement made under authority of Congress and with knowledge and encouragement of the Board and with the approval and instigation of the C.I.O. union whose members now gain back pay by its repudiation. We think this can not be justified as an unfair labor practice outlawed by Congress. That resistance to closed-shop unions will likely be stiffened if employers must underwrite the fairness of closed-shop unions to applicants and members, and that a good deal labor has fought for may be jeopardized if the price of obtaining it is to leave the union policed by the employer, are considerations beyond our concern. We can only view this as a very unfair construction of the statute to the employer and one not warranted by anything Congress has directed or authorized.